



September 10, 2021

Sent via email: maggie@greatoutdoorsfoundation.org
tashby@dmampo.org

Maggie McClelland, Project Manager
Central Iowa Water Trails
501 SW 7th Street, Suite G
Des Moines, IA 50309

Mr. Todd Ashby, CEO/Executive Director
Des Moines Area Metropolitan Planning Organization
420 Watson Powell, Jr. Way, Suite 200
Des Moines, IA 50309

RE: Plans and Specifications for the Central Iowa Water Trails BUILD Grant

Ms. McClelland and Mr. Ashby:

The City has reviewed the August 20, 2021 check plans for the Central Iowa Water Trails BUILD project and the responses to City staff comments dated September 3, 2021. City approval is subject to previous comments being addressed and satisfactorily incorporated into plans and specifications as noted in responses to City comments. In addition, City Engineer approval of the plans and specifications is subject to resolution and incorporating the following into the final plans and specifications:

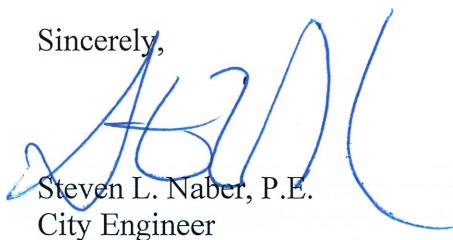
1. Approval is subject to the condition that all projects obtain (applicable) local, state, and /or federal floodplain permits. In general, technical memorandums and hydraulic analysis have been provided demonstrating that each site can meet the City Chapter 50 requirements, with the noted exception of Scott Avenue that has been granted a variance specifically for the inability to achieve a No-Rise.
2. Naming and recognition are included in the plans but are not approved. In accordance with the 28E Agreement between Central Iowa water Trails and the City of Des Moines, being considered by City Council on September 13, 2021, naming rights and donor recognition are to be provided in a separate agreement by the Des Moines City Council and in accordance with the City's Policy For Naming of Streets, Facilities, and Parkland in the City of Des Moines.
3. Finalized contract time provisions that incorporate appropriate coordination, requirements and City staff comments to minimize impact to adjacent projects and uses, including Metro Waste Authority, City Public Works, City Parks and Recreation, Wastewater Reclamation Authority, Rowing Club, Drake University Rowing, Captain Roy's, Birdland Marina users, levee construction, Animal Control Facility at Harriet.

4. Comply with terms of Supplemental Agreement No. 2 that amends the lease of Prospect Park between the Secretary of the Army and the City of Des Moines. A draft of the document is attached to this letter. Specifically, please note:
 - a. Prospect Park plans and specifications will need to include provisions requiring testing of fill material (borrow and waste) to ensure contaminated materials are not being delivered or leaving Prospect Park (21.d of attached).
 - b. Ensure the required inspection by the Rock Island Real Estate Division is satisfactorily accomplished prior to certifying project completion and recommending City acceptance (21.e of attached)
5. The Scott Avenue project will place regulatory signage as provided in the September 3, 2021 response, including restricting fishing on a portion of the Scott Avenue Bridge. Once the language and restrictions are finalized, an ordinance will be drafted and presented to City Council for consideration. In addition to the portage signage, signs warning paddlers of the potential for fishing from the Scott Avenue Bridge will be placed as part of the project.
6. Pay items and quantities for the Scott Avenue Stormwater Box Repair will be revised include both a lump sum pay item and a pay item with a measured quantity as discussed and agreed to on September 1, 2021.
7. If the awarded bid amount or construction cost of the stormwater box repair exceed \$200,000, the City Engineer will be consulted.

The City will never have been deemed to approve or consent to any plans and specifications that degrade or harm any Des Moines Metropolitan Wastewater Reclamation Authority or City improvements or facilities, or that reduce the quality of the final improvements. The City will never be deemed to approve or consent to a waiver of any provisions of the plans and specifications or to have consented or authorized the use of defective workmanship or materials.

Feel free to contact me at SLNaber@dmgov.org or by phone at (515)283-4563.

Sincerely,



Steven L. Naber, P.E.
City Engineer

cc: Mark Land, Snyder & Associates
Pamela S. Cooksey, P.E. Assistant City Manager

DEPARTMENT OF THE ARMY
SUPPLEMENTAL AGREEMENT No. 2
LEASE NO. DACW25-1-93-4040
SAYLORVILLE LAKE PROJECT
DES MOINES RIVER, POLK COUNTY, IOWA

THIS SUPPLEMENTAL AGREEMENT NO. 2, is made on behalf of the United States, between the Secretary of the Army, hereinafter called the "Government," and the City of Des Moines, Iowa, hereinafter called the "Lessee."

WITNESSETH:

WHEREAS, the Government previously granted a lease for public park and recreational purposes, designated as Lease No. DACW25-1-93-4040, hereinafter referred to as the "Original Lease," expiring on April 14, 2036, to use and occupy approximately 262.30 acres, more or less, of land and water areas under the primary jurisdiction of the Department of the Army;

WHEREAS, on November 6, 2008, the Government executed Supplemental Agreement No. 1 to the Original Lease, to expand the lease area by approximately 20.30 acres, thereby increasing the total acres leased to 282.60 acres, more or less, to coincide with current management efforts on the land by the Lessee; update Conditions 2, 4, and 17; and add Conditions 19 and 20(a-b); and,

WHEREAS, under Condition 2 of said lease, the Lessee requests the Government amend the Original Lease for the purpose of replacing and/or updating, in whole or in part, the improvements and amenities at Prospect Park as shown on Exhibit C-1, which is made a part of said lease.

NOW THEREFORE, upon execution of this Supplemental Agreement No. 2, the Original Lease is amended in the following respects:

1. "District Engineer" is replaced with "Real Estate Contracting Officer" throughout the document.
2. The Lease shall be amended to include Condition No. 21 as follows:

21. SITE SPECIFIC CONDITIONS

Lessee is approved to construct the following improvements upon that part of the leased premises called Prospect Park: ADA compliant hard surface

trails to angler access/fishing rock vanes and park amenities, additions of pedestrian crossings, an extension of the multi-purpose trail, addition of lights at key locations and parking areas, addition of native landscaping and green stormwater elements and natural channel design techniques, update of canoe/kayak launch area, motorized boat launch access and park entrance road for recreational purposes. All said improvements are depicted in the approved construction plans attached and incorporated herein as Exhibit C-1, hereinafter referred to as the "Project", subject to the following conditions.

- a. Lessee shall comply and adhere to the terms and conditions set forth in the Individual Permit for 2021-0199 authorized by the U.S. Army Corps of Engineers Rock Island District Regulatory Branch on or about September 1, 2021.
- b. Lessee must provide the following documentation to the Rock Island District Real Estate Division Management and Disposal Branch, attention Ms. Carri Nickel, for review and acceptance before any work may commence.
 - a. Stormwater protection plan permit;
 - b. Coordination and concurrence letters from the United States Fish and Wildlife Service that support and supplement the Federal Highway Administration's ESA determination regarding the Endangered Species Act;
 - c. Iowa DNR Floodplain Construction Permit and any other state or local flood plain development permits; and,
 - d. Documentation that the Project complies with state and local flood plain development regulations and will not impact flood levels within the reach.
- c. As a best-management practice for protected bats, the Lessee shall schedule any tree trimming or tree removal that may be necessary for the activity contemplated herein between October 1 and March 31.
- d. Any fill material brought on to government land from another site or leaving government land for use on another site must be tested to ensure contaminated materials are not leaving or being deposited on US government property in accordance with applicable Federal and state regulations. If the transfer of fill material is needed and materials are tested for contaminants, a report must be provided to the Rock Island District Real Estate Division, Management and Disposal Branch, attention Ms. Carri Nickel, upon completion.
- e. Lessee shall notify the Rock Island District Real Estate Division, Management and Disposal Branch, Carri Nickel at (309) 794-5016 upon completion of the construction project to establish a time that is mutually convenient, but no

later than 60 days after project completion, to inspect the Project and ensure compliance with the terms of this agreement.

All other terms and conditions of the Original Lease and subsequent supplemental agreements remain in full force and effect.

[The remainder of this page is left intentionally blank.]

DRAFT

This Supplemental Agreement No. 2 is executed on behalf of the United States by authority of the Secretary of the Army, this _____ day of _____ 2021.

Amanda J. Forslund
Team Lead, Management and Disposal Branch
Rock Island District
Real Estate Contracting Officer

ACKNOWLEDGMENT

STATE OF ILLINOIS)
) : **ss**
COUNTY OF ROCK ISLAND)

BEFORE ME, a Notary Public in and for State of Illinois, personally appeared Amanda J. Forslund, Team Lead, Management and Disposal Branch, Real Estate Contracting Officer, Real Estate Division, U.S. Army Corps of Engineers, Rock Island District, to me known to be the identical person and officer whose name is subscribed to the foregoing instrument, and acknowledged to me that she executed the said instrument by authority of the Secretary of the Army for the purposes therein expressed as the act and deed of the United States of America.

GIVEN under my hand and seal, this _____ day of _____, 2021.

NOTARY PUBLIC

(SEAL)

My Commission Expires:

This Supplemental Agreement No. 2 also is executed by the Lessee this _____ day of _____ 2021.

The undersigned, acting as an officer of the Lessee, represents and warrants that he is authorized to execute this Supplemental Agreement No. 2 without the necessity of obtaining any other signature of any person, that the execution of this Supplemental Agreement No. 2 has been properly authorized by the governing body of the Lessee, and that this Supplemental Agreement No. 2 is fully binding on Lessee.

City of Des Moines, Iowa

T.M. Franklin Cownie
Mayor, City of Des Moines

ACKNOWLEDGMENT

STATE OF IOWA)
) : ss
COUNTY OF POLK)

On this _____ day of _____, 2021, before me, a notary in and for said county and state, personally appeared T.M. Franklin Cownie to me personally known, who being by me duly sworn did say that the person is the Mayor of Des Moines, Iowa; that said instrument was signed on behalf of the said City of Des Moines, by the authority of its governing body and the Mayor acknowledged the execution of said instrument to be a voluntary act and deed of the City of Des Moines, Iowa, for the uses and purposes therein mentioned.

NOTARY PUBLIC

(SEAL)

My Commission Expires:

CERTIFICATE OF AUTHORITY

I, P. Kay Cmelik, certify that I am the City clerk of the City of Des Moines, Iowa, named as Lessee herein; that T.W. Franklin Cownie, who signed the Supplemental Agreement No. 2 on behalf of the City of Des Moines, Iowa, is the Mayor of Des Moines, Iowa, and that T.W. Franklin Cownie was duly authorized to sign and execute said Supplemental Agreement No. 2 on behalf of Lessee, and that execution of said Supplemental Agreement No. 2 is within the scope of Lessee's legal authority.

P. Kay Cmelik
City Clerk
City of Des Moines, Iowa

ACKNOWLEDGMENT

STATE OF IOWA)
) : ss
COUNTY OF POLK)

On this ____ day of _____ 2021, before me a Notary Public in and or said County and State, personally appeared P. Kay Cmelik to me personally known, who being by me duly sworn did say he/she is the City Clerk of the City of Des Moines, Iowa, and acknowledged that the execution of said instrument to be his/her voluntary act and deed.

NOTARY PUBLIC

(SEAL)

My commission expires:

**AGREEMENT REGARDING USDOT BUILD GRANT TO THE DES MOINES AREA
METROPOLITAN PLANNING ORGANIZATION**

Between

**The City of Des Moines, the Des Moines Area Metropolitan Planning Organization,
Central Iowa Water Trails, LLC, and Polk County Conservation**

THIS AGREEMENT (hereinafter "**Agreement**") is made and entered into, effective on the date herein provided, by and between the City of Des Moines, Iowa, a municipal corporation organized and existing under the laws of the State of Iowa (hereinafter "**CITY**"); and the Des Moines Area Metropolitan Planning Organization, a unit of local government pursuant to Iowa Code Chapter 28E (hereinafter "**MPO**") the Central Iowa Water Trails, LLC, an Iowa limited liability company, 501 SW 7th Street, Suite G, Des Moines, IA 50309 (hereinafter "**CIWT**"), and Polk County Conservation (hereinafter "**PCC**").

WHEREAS, the MPO applied for and was awarded a Better Utilizing Investments to Leverage Development Transportation Discretionary Grants Program (hereinafter "**BUILD Grant**") grant in an amount not to exceed \$25,000,000 for the first phase of a multi-phased project that will mitigate a dangerous low-head dam at Scott Avenue to help facilitate a water recreational trail, and enhance access points at Prospect Park, Birdland Marina and Harriet Street along the Des Moines River within the City of Des Moines (such first phase, hereinafter "**PROJECT**"); and

WHEREAS, the MPO has worked with the CIWT on the development and design of the PROJECT; and

WHEREAS, since the BUILD Grant award, CITY staff have been included in PROJECT design coordination with CIWT and consultants under contract with CIWT, as the PROJECT is, with the exception of the Des Moines River, located on CITY owned or leased property; and

WHEREAS, the BUILD Grant Agreement for the PROJECT is between the United States Department of Transportation (hereinafter "**USDOT**"), Iowa Department of Transportation (hereinafter "**IDOT**"), as the recipient, and the MPO, as the first-tier recipient; and

WHEREAS, the PROJECT is estimated to cost approximately \$40 million, with up to 80%, not to exceed \$25 million, of the construction cost being funded by the BUILD Grant, \$550,000 of Surface Transportation Block Grant funds, and remaining funding from CIWT through donations and local contributions; and

WHEREAS, CIWT has entered into professional services agreement with Merrick & Company to design certain PROJECT improvements at the low-head dam at Scott Avenue as part of BUILD Grant implementation, as more fully set forth in a Master Agreement for Professional Services, dated effective February 17, 2020 (as may be amended from time to time for additional services, the "**MERRICK CONTRACT**"); and

WHEREAS, CIWT has entered into professional services agreement with I & S Group, Inc., a Minnesota corporation, to design certain PROJECT improvements at Prospect Park, Birdland Marina, and Harriet Street as part of BUILD Grant implementation, as more fully set

forth in an Agreement for Professional Services, dated effective March 16, 2020 (as may be amended from time to time for additional services, the “**ISG CONTRACT**” and, together with the Merrick Contract, the “**DESIGN CONTRACTS**”); and

WHEREAS, the BUILD Grant Agreement allows the IDOT as the Recipient to enter into a separate agreement with the MPO as the First Tier Recipient to assign responsibilities among the Recipient and First-Tier Recipient for administration and oversight and the IDOT and the MPO have entered into a Sub-Agreement regarding the financing and obligations that accompany the Federal funding provided by the BUILD Grant and Surface Transportation Block Grant funding (hereinafter “**Sub-Agreement #1**”); and

WHEREAS, pursuant to the BUILD Grant Agreement and Sub-Agreement #1, the MPO is the contracting authority and remains in responsible charge for the PROJECT construction; and

WHEREAS, as described herein, IDOT and CIWT agree that construction of the PROJECT will be bid through the IDOT and the MPO, as the contracting authority, is responsible for the construction of the PROJECT, including entering into the necessary agreement(s) with a general contractor for the construction of the PROJECT (hereinafter “**CONTRACTOR**” or “**GENERAL CONTRACTOR**”); and

WHEREAS, the MPO is entering into a separate Agreement Regarding Construction and Funding of the Build Grant Project, with CIWT and Polk County for services, including required construction administration and observation, including required material testing and sampling (the “**FUNDING AND CONSTRUCTION AGREEMENT**”); and

WHEREAS, CIWT will oversee the operation and maintenance of the constructed facilities for the required time period under the BUILD Grant Agreement following the construction of the PROJECT, as more fully set forth in Section 4 of this Agreement in conjunction with PCC and in the CITY-CIWT 28E Agreement (defined below); and

WHEREAS, the CITY and CIWT have entered into a 28E Agreement that addresses the governance, operation, maintenance of the PROJECT improvements (hereinafter “**CITY -CIWT 28E Agreement**”); and

WHEREAS, this Agreement between the CITY, MPO, CIWT and PCC is intended to provide the terms for the BUILD Grant implementation, PROJECT design, operations, maintenance, CITY financial contribution, and other PROJECT obligations.

NOW, THEREFORE, the CITY, MPO, CIWT and PCC do hereby agree as follows:

Section 1. General Requirements & Responsibilities

1. Access to CITY Property. By this Agreement, the CITY is granting access to CITY property and infrastructure to the MPO, CONTRACTOR and its subcontractors, and Polk County, Polk County Conservation and CIWT and their respective contractors and consultants, and state and federal agencies for construction of the PROJECT on CITY owned and leased property and modifications to CITY infrastructure, as shown on Attachment 1, for CITY project construction (levee), construction of the PROJECT improvements as defined in APPROVED PLANS as defined in Section 3.7, and for CIWT’s maintenance and administrative obligations as further described in Section 4 of this Agreement, and in the CITY- CIWT 28E Agreement. All

such access shall be subject to a mutually acceptable path of ingress/egress, and the CITY agrees to provide access to those portions of CITY property and/or infrastructure which are needed for the construction of the PROJECT and, thereafter, the maintenance, operation, and administration of the PROJECT improvements and, with respect to CIWT and its contractors, employees, and agents, access necessary to perform its obligations under the CITY -CIWT 28E Agreement. Such access and PROJECT construction shall be limited to that which minimizes, as far as reasonably possible, conflict with and use of existing improvements on CITY property and the public's use of CITY park property. Except for the Lease Agreement between the CITY and the United States of America, Army Corps of Engineers, including approximately 262.30 acres of land along the Des Moines River and including Prospect Park and which was approved by the City Council of CITY on July 27, 1998 by Roll Call No. 98-2404, to the best of its current knowledge, City represents and warrants to the other parties hereto that there is no agreement that would prevent CITY from providing the access granted hereunder with respect to real estate covered by this Agreement that the CITY controls or leases, but does not own in fee.

2. CITY Right to Continued Access. The CITY and the CITY employees, contractors, consultants, elected and appointed officials, agents and volunteers have the right to access CITY property and infrastructure at any time for access required for flood fighting, normal operation and maintenance of CITY property and infrastructure, in addition to access deemed necessary by the City Engineer or City Manager to ensure the public health, welfare or safety. The MPO and others with access for the PROJECT are required to coordinate such access as required by the City Engineer and Parks and Recreation Director as described in Section 3.15.

3. CITY Rights of Approval. As further described in this Agreement the CITY shall have and possess final rights of approval, acting reasonably, of all plans, specifications, and construction of improvements on CITY property or which modifies CITY infrastructure. Said approvals shall not constitute the necessary permits or licenses of applicable governmental agencies, which shall be the responsibility of the MPO to obtain. The fees for all City permits and inspections required for construction of the PROJECT will be paid as part of the construction costs.

4. Limited CITY Funding. The CITY funding contribution for the PROJECT will be paid to the CIWT as a contribution to the PROJECT as a portion of the non-federal match required by the BUILD Grant Agreement for a total of \$6,000,000.00 (Six Million Dollars), as follows, subject to City Council budget approvals and the following:

- \$1,000,000 by July 31, 2022, if the CONTRACTOR is on-site and construction of the PROJECT is underway.
- \$1,500,000 by July 31, 2023, if construction has satisfactorily progressed by being on schedule and in compliance with PROJECT requirements.
- \$1,750,000 by July 31, 2024, if construction is substantially complete.
- \$1,750,000 by July 31, 2025 or the later date of acceptance of the PROJECT as defined in Section 3.18.

The foregoing funding obligations are subject to applicable Iowa law and to the MPO and CIWT being in compliance with the terms of this Agreement, compliance with Iowa Code Chapters 26 and 573, and the BUILD Grant Agreement. The MPO and CIWT and the CITY acknowledge and agree that all of the obligations of the CITY under this Agreement shall be subject to, and performed by the CITY in accordance with all applicable statutory, common law, or constitutional provisions and procedures consistent with the CITY's lawful authority.

Except as described in this section and in Sections 1.5, the CITY is not required to provide any additional funds for construction of the PROJECT. In addition, except as provided in the CITY-CIWT 28E Agreement, the CITY is not required to provide other funds to the CIWT, PCC, or MPO or in support of the PROJECT for any other purpose, including, without limitation, new construction, maintenance, repair, reconstruction (including demolition), replacement, or capital improvement funding.

5. Stormwater Box Repair. Subject to the APPROVED PLANS as defined in Section 3.7 and City Council approval of the estimated costs for the stormwater box repair as reflected in the APPROVED PLANS, the CITY will fund construction costs for the stormwater box repair at the Scott Avenue Dam being done as part of the PROJECT construction pursuant to the APPROVED PLANS. The foregoing funding obligation is subject to applicable Iowa law and to the MPO and CIWT being in compliance with the terms of this Agreement, compliance with Iowa Code Chapters 26 and 573, and the BUILD Grant Agreement. The MPO and CIWT and the CITY acknowledge and agree that all of the obligations of the CITY under this Agreement shall be subject to, and performed by the CITY in accordance with all applicable statutory, common law, or constitutional provisions and procedures consistent with the CITY's lawful authority.

6. No CITY Obligation Regarding BUILD Grant. Nothing in this agreement obligates the CITY to be responsible for any of the requirements or obligations of the BUILD Grant Agreement or the Sub-Agreement.

7. Fishing Access. CITY has right to and will regulate fishing access in accordance with CITY ordinance and Iowa Department of Natural Resources requirements.

8. CITY Ownership of Landside PROJECT Improvements. Subject to compliance with the terms of this Agreement, the CITY will accept ownership only of the completed PROJECT improvements which are located or constructed landside on CITY owned or controlled property and not within the Des Moines River, and excluding power/controls of in-water improvements, safety, course directional, decorative and artistic signage, and any modifications or attachments to the Scott Avenue Dam (hereinafter "**the Landside PROJECT Improvements**"). Nothing herein shall be construed to change the ownership of WATER TRAIL PROJECT IMPROVEMENTS, as further defined and described in the CITY-CIWT 28E Agreement.

9. Term. This Agreement is effective upon approval and acceptance by the City Council and shall terminate on the later of the date of City Council acceptance of the Landside PROJECT Improvements or the date that CITY makes its final payment under Section 1.4 of this Agreement, except that Sections 2.2, 2.3, 2.4, 2.5, Sections 3.1, 3.2, 3.3, 3.4, 3.5, 3.6, and Section 4 shall survive the termination of this Agreement.

10. Termination.

a. Right to Terminate. Prior to the beginning of construction of the PROJECT, any party to this Agreement may notify the other of its desire to terminate this Agreement by sending written notice of such desire to terminate, specifying the reasons for termination, at least five business days prior to the effective date of such requested termination. In the event of termination, the parties shall be liable for their respective expenses incurred up to the effective date of termination and will be relieved of any obligations or liabilities under this Agreement after said effective date.

b. Termination for Breach. This Agreement may be terminated prior to expiration of the Agreement term if MPO and/or CIWT shall materially violate or default in the performance of any of the terms, obligations, covenants, agreements or conditions of this Agreement and such violation or default shall continue for a period of one hundred twenty (120) days after written notice by the CITY to MPO and/or CIWT of such violation or default. Upon the occurrence of such event, then without prejudice to any other remedies that the CITY might have, the CITY shall have the right, at its sole option to immediately declare this Agreement forfeited and said term ended, and to re-enter upon the CITY property with or without process of law, using such force as may be necessary.

c. Possession and Condition upon Termination. At the expiration or termination of this Agreement as provided herein, CIWT will immediately deliver possession of the CITY property to CITY as follows:

(i) If *prior to* commencement of any construction, other than grading, of the PROJECT: Prior to the time of such delivery, CIWT will restore the CITY property to a condition substantially similar to its condition at the beginning of this Agreement, within ninety (90) calendar days following expiration or termination of this Agreement, subject to extension for delays outside the reasonable control of CIWT but in no event greater than 180 calendar days following said expiration or termination. CIWT shall have the access rights provided under Section 1.1 of this Agreement for the purposes provided in this Section and notwithstanding the termination of this Agreement.

(ii) If *after* commencement of any construction, other than grading, of the PROJECT: CIWT agrees to transfer ownership, without consideration or payment, to the CITY or to such other organization or entity as approved and identified in writing by the CITY, at CITY's sole discretion, of any Water Trail Improvements owned by CIWT. The PROJECT improvements shall be deemed abandoned by CIWT and under the possession and ownership of the CITY, and the CITY may remove, dispose of, complete construction of, or retain and use said Improvements in any manner that CITY, at its sole discretion, so chooses, and may charge any costs to CIWT for removal and disposition of said Improvements.

11. Assignment and Prohibition Against Transfer. The rights and liabilities of the parties under this Agreement may not be assigned by one party without the prior written consent of the other parties to this Agreement, which consent shall be contained in one document executed by all parties hereto rather than by separate assignment/consent agreements. CIWT covenants and agrees that it has not and will not, without the prior written approval of CITY, by written consent of its City Manager, make or create, or suffer to be made or created, any total or partial assignment of its interest or rights under this Agreement and CITY shall be entitled to require as a condition to any such assignment:

a. Any proposed assignee shall be a public or private non-profit entity and have the qualifications and financial responsibility, as determined by CITY, necessary and adequate to fulfill the agreements and obligations undertaken in this Agreement by CIWT.

b. Any proposed assignee by an instrument in writing satisfactory to CITY, shall, for itself and its successors and assigns, and expressly for the benefit of CITY,

expressly assume all of the agreements and obligations of CIWT under this Agreement and agree to be subject to all the terms, conditions, covenants and restrictions to which CIWT is subject.

- c. All instruments and other legal documents involved in effecting assignment or sublease be submitted to CITY for prior review and approval by City Manager of CITY.

Provided, that in the absence of specific written agreement by CITY to the contrary, no such approved assignment shall be deemed to relieve CIWT from any of its obligations with respect to any of its obligations under this Agreement.

12. Notice. Except as otherwise specified, all notices, consents, approvals, requests and other communications (hereinafter referred to as "Notices") required or permitted under this Agreement shall be given in writing and mailed by certified mail, return receipt requested, addressed as follows, or by e-mail, and if by e-mail shall be deemed given on the day of mailing: If to the City: City of Des Moines, City Manager, 400 Robert D. Ray Drive, Des Moines, IA 50309, E-mail: CityManager@dmgov.org. If to MPO: R. Todd Ashby, CEO/Executive Director, 420 Watson Powell, Jr. Way, Suite 200, Des Moines, IA 50309, E-mail: tashby@dmampo.org. If to CIWT: Maggie McClelland, Project Manager, 501 SW 7th Street, Suite G, Des Moines, IA 50309, E-mail: maggie@greatoutdoorsfoundation.org. If to PCC: Rich Leopold, Director, 12130 NW 128th Street, Granger, Iowa 50109. E-mail: Rich.Leopold@polkcountyiowa.gov.

Any party to this Agreement may change its address for the receipt of Notices at any time by giving notice thereof to the other as herein provided. Any notice given by a party hereunder must be signed by an authorized representative of such party.

13. Project Agreements. As between the MPO and CIWT, nothing in this Agreement shall be construed to amend any liability or obligation one has to the other (or any other party under a separate agreement) with respect to the Project, including, any obligations or liability arising under the FUNDING AND CONSTRUCTION AGREEMENT.

14. Order of Priority. As between this Agreement and CITY-CIWT 28E Agreement, this Agreement and all Exhibits and Attachments hereto control for BUILD Grant Agreement requirements in the event of conflict, and the CITY-CIWT 28E Agreement and all Exhibits and Attachments thereto control with respect to any issue relating to the Project not explicitly addressed in this Agreement.

Section 2. Design

1. The CIWT is responsible for complying with all applicable PROJECT requirements, outlined in this Agreement and the FUNDING AND CONSTRUCTION AGREEMENT, including the BUILD Grant Agreement requirements, imposed on CIWT thereunder, including those listed below, and the following additional requirements:

- a. National Environmental Policy Act (NEPA), State Historic Preservation Office (SHPO)/Section 106 of the National Historic Preservation Act and Section 4 (f) of the USDOT Act.
- b. Federal, State, local permits for the construction of the PROJECT.
- c. Americans with Disabilities Act (ADA) and implementing regulations.

- d. Shall not discriminate against any employees or applicants for employment on the basis of age, race, religion, creed, color, sex, sexual orientation, national origin, ancestry, familial status, or disability. CIWT shall include and shall cause consultants to include such non-discrimination provision in all design subcontracts for the PROJECT, including, without limitation, the Design Contracts.
- e. Public involvement, neighborhood outreach, City Board and Commission reviews and approvals in connection with the PROJECT, as determined by the CITY.

2. A. To the fullest extent permitted by law, CITY agrees to defend, pay on behalf of, indemnify, and hold harmless CIWT against any and all claims, demands, suits, damages or losses, together with any and all outlay and expense connected therewith including, but not limited to, attorneys' fees and court costs that may be asserted or claimed against, recovered from or suffered by CIWT by reason of any injury or loss including, but not limited to, personal injury, bodily injury including death, property damage including loss of use thereof, and economic damages that arise out of or are in any way connected or associated with CITY's responsibilities regarding funding and maintenance of Landside PROJECT Improvements under this Agreement, subject to CIWT compliance with its responsibilities under this Agreement relating to such CITY responsibilities. Nothing herein shall be construed to limit CITY from seeking indemnity from third parties under separate agreements or Exhibits or Attachments hereto, including, without limitation, under licenses and warranties from design consultants and construction contractor(s) and subcontractor(s).

B. To the fullest extent permitted by law, CIWT agrees to defend, pay on behalf of, indemnify, and hold harmless the CITY of Des Moines, Iowa, its elected and appointed officials, employees, agents, volunteers, boards, commissions, and others working on its behalf (hereinafter "CITY") against any and all claims, demands, suits, damages or losses, together with any and all outlay and expense connected therewith including, but not limited to, attorneys' fees and court costs that may be asserted or claimed against, recovered from or suffered by the CITY by reason of any injury or loss including, but not limited to, personal injury, bodily injury including death, property damage including loss of use thereof, and economic damages to the extent the same arise out of or are in any way connected or associated with CIWT's work or services provided under this Agreement, including, those related to the PROJECT design, funding, BUILD Grant implementation, and agreements with MPO or others associated with development, design, construction, operation or maintenance of the PROJECT, and including work or services of its officers, agents, employees, subcontractors and others under the control of CIWT in connection with the foregoing. Nothing herein shall be construed to limit CIWT from seeking indemnity from third parties under separate agreements, including, without limitation, under the Design Contracts.

CIWT'S obligation to indemnify the CITY contained in this Agreement is not limited by the amount or type of damages, compensation or benefits payable under any workers' compensation acts, disability benefit acts, or other employee benefits acts.

The CITY shall not be liable or in any way responsible for any injury, damage, liability, claim, loss or expense incurred by CIWT arising out of or in any way connected or associated with CIWT'S work or services under this Agreement, including that of its officers, agents, employees, subcontractors and others under the control of CIWT, except to the extent caused by or resulting from the negligent act or omission of the CITY (as defined in this Section) or the CITY'S employees, consultants, agents or others for whom the CITY is responsible.

CIWT expressly assumes responsibility for any and all damage caused to CITY property to the extent arising out of or in any way connected or associated with CIWT'S work or services under this Agreement, including that of its officers, agents, employees, subcontractors and others under the control of CIWT.

CIWT shall ensure that its activities on CITY property will be performed and supervised by adequately trained and qualified personnel and CIWT will observe all applicable safety rules.

3. CIWT will pay all legal costs, including attorney fees, that the CITY incurs in enforcing the CITY's rights under this Agreement.

4. CIWT agrees to require that both Merrick & Company and I & S Group, Inc. provide the CITY with a written warranty that the design and specifications for the PROJECT, for which each such party is responsible under its respective Design Contract, are in accordance with generally recognized engineering or safety standards or design theories in existence at the time of the construction of the PROJECT and require Merrick & Company and ISG, Inc. to agree to indemnify the City in conformance with and, as provided in **Attachment 2**.

5. CIWT agrees to require that both Merrick & Company and I & S Group, Inc. provide the CITY with an unlimited, non-exclusive, copyright license to the PROJECT Designs and Plans, in conformance with and as provided in Attachment 2. CIWT makes no representation or warranty regarding said licenses, such licenses being strictly from Merrick & Company and I & S Group, Inc., as applicable, to the CITY; however, nothing in this Section limits the obligations of CIWT or the indemnification to be provided by CIWT to CITY under this Agreement.

6. In addition to PROJECT design, CIWT will fund the design of the stormwater box repair at the Scott Avenue Dam such that the work can be accomplished as part of the MPO PROJECT construction and subject to the written approval of the City Engineer. Construction cost responsibility is outlined in Section 1.5 of this Agreement.

7. CIWT will fund and contract with Merrick & Company and with I & S Group, Inc., including appropriate subconsultants, to provide design services during PROJECT construction. These services shall supplement the required construction inspection services to be performed by Polk County and Snyder & Associates for the PROJECT. Design services during construction include: shop drawing review and approval; response to questions during construction; interpretation of design and specifications; assistance with change order preparation and recommendation; site observation to determine substantial completion; recommendation regarding PROJECT acceptance during construction.

8. CIWT will fund and contract with Merrick & Company and with I & S Group, Inc., including appropriate subconsultants, to prepare and provide a maintenance manual for the PROJECT improvements that includes all operation and maintenance information necessary to safely and appropriately operate the completed PROJECT.

Section 3. Construction

1. The MPO is responsible for complying with all applicable PROJECT requirements, including the BUILD Grant Agreement requirements and the following additional requirements:

- a. NEPA, SHPO/Section 106 of the National Historic Preservation Act and Section 4(f) of the USDOT Act
 - b. Federal, State, local permits for construction of the PROJECT.
 - c. All applicable requirements of Iowa Code Chapter 26, including required public hearing on and approval of the plans, specifications, form of contract, estimate of costs, advertisement and notice to bidders, bid security, and opening and award of bids.
 - d. Americans with Disabilities Act (ADA) and implementing regulations.
 - e. Shall not discriminate against any employees or applicants for employment on the basis of age, race, religion, creed, color, sex, sexual orientation, national origin, ancestry, familial status, or disability. MPO shall include and cause its CONTRACTOR to include such non-discrimination provision in all subcontracts for the PROJECT.
 - f. Iowa Code Chapter 573 bonding requirements.
2. The MPO hereby agrees to be responsible for all costs for PROJECT construction, compliance with the BUILD Grant Agreement, and the Sub-Agreement.
3. The MPO agrees to perform all its obligations under the BUILD Grant Agreement and Sub-Agreement, including any amendments. Obligations include, but are not limited to, grant administration, financial responsibility associated with construction and ongoing obligations pursuant to the BUILD Grant Agreement, progress and financial reporting and performance reporting. If the MPO breaches either the BUILD Grant Agreement or Sub-Agreement and the breach results in any costs or damages awarded against or incurred by the CITY, the MPO agrees to immediately reimburse those costs or damages to the CITY.
4. In the event that either the BUILD Grant Agreement or the Sub-Agreement or any of the provisions are nullified or set aside by a court or by agreement resulting in any costs or damages or reimbursements awarded against the CITY, the MPO agrees to pay those costs or damages or reimbursements or if the CITY has paid them, then to immediately reimburse the CITY for those costs or damages or reimbursements.
5. MPO shall defend, indemnify, and hold the CITY, its elected and appointed officials, and its agents, employees and volunteers, harmless from and against all claims, demands, actions, suits, judgments, losses, or damages including attorney fees arising out of the BUILD Grant Agreement, Sub-Agreements, arising out of construction of the PROJECT or the CONTRACTOR or other PROJECT construction contractors, sub-contractors and suppliers. Nothing herein will be construed to limit MPO from seeking indemnity from third parties under separate agreements, including, without limitation, under the Construction Contracts.
6. Intentionally deleted.
7. The construction of PROJECT improvements shall be carried out in accordance with the plans and specifications approved by the Des Moines City Engineer (“**APPROVED PLANS**”) or changes approved by the City Engineer, as described in Section 3.12.
8. The CITY is a third-party beneficiary of the contract between the MPO and the CONTRACTOR. MPO’s CONTRACTOR shall perform work on CITY property and that modifies CITY infrastructure to the reasonable satisfaction of CITY, making and installing all such improvements in compliance with the APPROVED PLANS.

9. PROJECT will be constructed in accordance with the Iowa Department of Transportation Standard Specifications with GS-15012 revisions plus applicable development, supplemental, special provisions and APPROVED PLANS.
10. MPO shall provide the CITY with a copy of the final, certified plans and specifications for the PROJECT, and the construction for the PROJECT shall be performed and completed in accordance with the APPROVED PLANS.
11. MPO shall require the General Contractor to: (1) indemnify the CITY and itself, as well as obtain and maintain in continuous effect the insurance coverages and agree to the indemnification requirements specified in **Attachment 3** of this Agreement; and (2) impose the same requirements on any subcontractor. Attachment 3 is written as a special provision to replace IDOT standard specification, but may be utilized in other forms beyond IDOT agreements. MPO shall require the General Contractor to (1) provide the CITY with a certificate of insurance verifying the General Contractor's compliance with this coverage requirement at least two weeks prior to the beginning of any work by the contractor; and (2) impose the same requirements on any subcontractor. MPO must provide the City with a copy of the contract between MPO and the General Contractor so that the City may determine compliance with the indemnification requirements of this subsection.
12. Any proposed changes to the APPROVED PLANS must be submitted to the City Engineer for review and approval prior to related work occurring. Any deviations from the APPROVED PLANS shall be permitted only with the prior written approval of the City Engineer. Any changes determined by the City Engineer to be material, will require submission to the City Council.
13. MPO and CONTRACTOR shall comply with all normal procedures required by the CITY. The CITY reserves the right to inspect all work on the PROJECT improvement to the same standard as if the improvement was a CITY-funded public improvement.
14. The MPO is responsible for all inspection and material testing. Project inspection reports and material reports will be provided to the CITY as requested.
15. MPO and CONTRACTOR shall contact the CITY's Engineering Department project manager Ben Cole, bmcole@dmgov.org at 515-283-4176 at least seventy-two (72) business hours before beginning construction. The CITY project manager is then responsible for contacting appropriate CITY departments, including Engineering, Parks and Recreation, and Public Works.
16. The City Engineer shall be permitted to inspect all work on the PROJECT improvements as additional oversight of the construction process, including test results, shop drawings and other construction documents.
17. The MPO shall arrange for a final inspection of the PROJECT improvements and shall inform the CITY in writing of the date and time of the final inspection at least seven (7) business days prior to the inspection. The MPO's engineer shall conduct the final inspection and develop a punch list of items for completion, if any. The City Engineer, or his designee, has the right to be present at such final inspection.
18. Upon MPO's determination that construction of the PROJECT has been completed, the MPO's engineer, a professional engineer licensed to practice in the State of Iowa, shall give

written notice of the completion to the CITY, therein declaring and certifying that all PROJECT improvements have been completed and constructed in substantial conformance with the APPROVED PLANS and approved changes as described in Section 3.12, shall provide the City Engineer with all inspection and testing reports which constituted the basis for such MPO's engineer's certification, and shall recommend final acceptance of the Landside PROJECT Improvements by the CITY.

19. The CITY's final acceptance of the Landside PROJECT Improvements will occur when City Council accepts the Landside PROJECT Improvements based on the MPO's engineer's recommendation as described in Section 3.18 and the City Engineer's written final approval that the PROJECT has been constructed and completed in substantial conformance with the APPROVED PLANS and approved changes as described in Section 3.12. Final acceptance does not constitute an acceptance of any unauthorized work, or acceptance of defective work or improper material. Notwithstanding the ability of the CITY to inspect the construction, the MPO shall have full responsibility to ensure that the construction is completed in accordance with the APPROVED PLANS and approved changes as described in Section 3.12. The City Council shall have sole discretion in accepting the improvements as complete. Acceptance of ownership of such improvements shall be subject to:

- (1) certification by the MPO's engineer that all of such improvements have been built in accordance with the APPROVED PLANS and approved changes as described in Section 3.12.
- (2) providing the City Engineer with all inspection and testing reports which constituted the basis for such MPO's reasonable basis on which to base such certification.
- (3) receipt of the written warranty and copyright license from Merrick & Company and I & S Group, Inc. and the CONTRACTOR in accordance with Sections 2.4, 2.5, and Sections 3.1, 3.22 and 23 of this Agreement.

20. MPO shall ensure that no mechanic's liens or other liens are filed against the PROJECT, CITY property or CITY infrastructure and will require the CONTRACTOR to take whatever steps are necessary to promptly remove any liens filed by anyone pertaining to the construction of the improvements. Notice is hereby given that no contractor, subcontractor, or anyone else who may furnish any materials, service, or labor for any improvements, alterations, repairs, or any part thereof shall at any time be or become entitled to any lien thereon.

21. Upon acceptance of the Landside PROJECT Improvements by the CITY, the MPO shall deliver to the CITY all PROJECT construction documents, records, shop drawings, as-built drawings, and manuals.

22. The MPO will provide, and will require its CONTRACTOR to provide, the CITY with copies of all final construction plans and documentation, including shop drawings and will require its CONTRACTOR to provide the CITY with an unlimited, non-exclusive, copyright license to all final construction plans and documentation, including shop drawings in conformance with and as provided in Attachment 4.

23. The MPO agrees to require that its CONTRACTOR provide the CITY with a warranty that the construction of the PROJECT improvements was in accordance with generally recognized engineering or safety standards or design theories in existence at the time of the construction of the PROJECT and to indemnify the CITY in conformance with the indemnification requirements specified in Attachment 4 of this Agreement.

Section 4. Maintenance

1. Following the construction of the PROJECT, CIWT will oversee the operation and maintenance of the constructed facilities for the required time period as addressed in the BUILD grant and Sub-Agreement, as further provided in the CITY-CIWT 28E Agreement.
2. The MPO will be responsible for overseeing the operation and maintenance of the constructed facilities for the required time period as addressed in the BUILD Grant Agreement and Sub-Agreement if the CIWT becomes unable or unwilling to perform as required.
3. Following acceptance of the Landside PROJECT Improvements, as provided under this Agreement, by the Des Moines City Council and in accordance with the CITY-CIWT 28E Agreement, the CITY will become owner of such improvements and maintain such Landside PROJECT Improvements in accordance with the CITY-CIWT 28E Agreement, and upon expiration or termination of such agreement, at the discretion of the CITY.
4. In accordance with the CITY - CIWT 28E Agreement:
 - a. CITY is not responsible for the costs of any rebuilding or replacement of any PROJECT improvements.
 - b. CITY shall be responsible for the costs of maintenance and repair for Landside PROJECT Improvements at Prospect Park.
 - c. The CITY shall perform routine maintenance of only the Landside PROJECT Improvements and area of the Birdland, Scott Avenue or Harriet as funded by the CIWT as part of the Downtown Water Trails Improvements (as defined in the CITY -CIWT 28E Agreement) being a part of the PROJECT.
5. In the event that CIWT does not provide full reimbursement to the CITY for CITY's maintenance costs per Article IV, Section A of the CITY-CIWT 28E Agreement, in any year(s) for the duration of said Agreement and in addition to and not in lieu of the CITY's rights set forth in said Agreement, the CITY will perform landside maintenance required by the BUILD Grant at, and only at, the Birdland Marina, Scott Avenue, and Harriet Street locations.
6. For the in-water project improvements constructed with the 2019 BUILD grant, the STBG funds secured by the MPO and the funds raised by CIWT, and in conformance with the maintenance standards of the CITY-CIWT 28E Agreement, CIWT shall contract with PCC to provide all in-water maintenance for the Project. Said maintenance shall continue for a period of twenty years from the date that the Scott Avenue portion of the Project is accepted by the City Council of CITY and opens.
7. In the event that CIWT or its successor entity is ever dissolved or declared insolvent, or this Agreement is terminated for breach and failure to cure in accordance with Section 1.10(b), PCC will continue to be responsible for all in-water maintenance for the Project for the twenty year period required under the terms of the BUILD grant and in conformance with the maintenance standards of the CITY-CIWT 28E Agreement. Said funding for PCC's maintenance obligation will be through a restricted fund held by the Greater Outdoors Foundation and transferred to PCC upon the dissolution or declared insolvency of CIWT or its successor entity.

8. The CITY will not own, maintain, repair or replace PROJECT modifications or attachments to the Scott Avenue Dam or any in-water improvements included in the PROJECT, the same to be owned by CIWT as provided in the CITY--CIWT 28E Agreement. For sake of clarity, the CITY will continue to own and maintain the Scott Avenue Dam.

9. CIWT will own, maintain, repair and replace all in-water PROJECT improvements, any power/controls of in-water improvements, safety, course directional, decorative and artistic signage, and any modifications or attachments to the Scott Avenue Dam.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their proper officers, duly authorized, therefore.

DES MOINES AREA METROPOLITAN PLANNING ORGANIZATION

Joe Gatto, Policy Committee Chairperson

STATE OF IOWA)
) ss:
COUNTY OF POLK)

On this _____ day of _____, 2021, before me, the undersigned, a Notary Public in and for the State of Iowa, personally appeared JOE GATTO, to me personally known, who being by me duly sworn, did say that he is a MPO CHAIRPERSON of the DES MOINES AREA METROPOLITAN PLANNING ORGANIZATION, that the seal affixed to the foregoing instrument is the seal of the corporation; that the instrument was signed and sealed on behalf of the corporation, by authority of its Policy Committee, and JOE GATTO acknowledged the execution of the instrument to be the voluntary act and deed of the corporation, by it and by his voluntarily executed.

Notary Public in the State of Iowa

CENTRAL IOWA WATER TRAILS, LLC

Dan Houston, Chair, Central Iowa Water Trails LLC

STATE OF IOWA)
) ss:
COUNTY OF POLK)

On this _____ day of _____, 2021, before me, the undersigned, a Notary Public in and for the State of Iowa, personally appeared Dan Houston, to me personally known, who being by me duly sworn, did say that he is the Chair of the CENTRAL IOWA WATER TRAILS, LLC, that such entity has no seal and that the instrument was signed on behalf of the Central Iowa Water Trails, LLC, by authority of its Board, on the ____ day of _____, 2021, and that Dan Houston acknowledged the execution of the instrument to be the voluntary act and deed of the Board, by it and by she voluntarily executed.

Notary Public in the State of Iowa

CITY OF DES MOINES, IOWA

T. M. Franklin Cownie, Mayor

ATTEST:

APPROVED AS TO FORM:

P. Kay Cmelik, City Clerk

/s/ Ann DiDonato (by GKF)
Ann DiDonato, Assistant City Attorney

STATE OF IOWA)
) ss:
COUNTY OF POLK)

On this ____ day of _____, 2021, before me, the undersigned, a Notary Public, personally appeared T. M. Franklin Cownie and P. Kay Cmelik to me personally know, who, being by me duly sworn, did state that they are the MAYOR and CITY CLERK, respectively, of the City of Des Moines, Iowa; that the seal affixed to the foregoing instrument is the seal of the corporation, and that the instrument was signed and sealed on behalf of the corporation, by authority of its City Council as contained in the Resolution adopted under Roll Call No. ____ dated _____, and that T. M. Franklin Cownie and P. Kay Cmelik acknowledged the execution of the instrument to be the voluntary act and deed of the municipal corporation, by it voluntarily executed.

Notary Public in the State of Iowa

POLK COUNTY CONSERVATION

Rich Leopold, Director, Polk County Conservation

STATE OF IOWA)
) ss:
COUNTY OF POLK)

On this day of , 2021, before me, the undersigned, a Notary Public in and for the State of Iowa, personally appeared Rich Leopold, to me, who being by me duly sworn, did say that he/she is the Director of POLK COUNTY CONSERVATION, that such entity has no seal and that the instrument was signed on behalf of the Polk County Conservation, by authority of its Board, on the day of , 2021, and that _____ acknowledged the execution of the instrument to be the voluntary act and deed of the Board, by it and by he/she voluntarily executed.

Notary Public in the State of Iowa

ATTACHMENT 1

Construction Limits Exhibit





ENCL:01 OKADOT DE:04:TEAM JSG DRAWN: DATE:01/14/2018 DESIGNED BY: DATE:02/02/2018 REVIEWER: DATE:02/02/2018 COUNTY: POLK PROJECT NO: EXP-PAR(BD01)-PV-17 SHEET TITLE: PROJECT LIMIT EXHIBIT SHEET NUMBER: A.04



ENCL:01 OKADOT DE:04:TEAM JSG DRAWN: DATE:01/14/2018 DESIGNED BY: DATE:02/02/2018 REVIEWER: DATE:02/02/2018 COUNTY: POLK PROJECT NO: EXP-PAR(BD01)-PV-17 SHEET TITLE: PROJECT LIMIT EXHIBIT SHEET NUMBER: A.04

ATTACHMENT 2

UNLIMITED, NON-EXCLUSIVE LICENSE OF COPYRIGHT RIGHTS TO DESIGN AND DESIGN DOCUMENTS FOR SCOTT AVENUE DAM IMPROVEMENTS AND DESIGN WARRANTY AND INDEMNIFICATION FOR SAME

WHEREAS, Central Iowa Water Trails, LLC, an Iowa limited liability company, located at 6900 Westown Parkway, West Des Moines, Iowa 50266, (“CIWT”) and Merrick & Company, a Colorado corporation located at 5970 Greenwood Plaza Blvd, Greenwood Village, CO 80111, (“MERRICK”), have entered into a Master Agreement for Professional Services for engineering and design services for on land and in-water improvements for Scott Avenue Dam as part of the implementation of a USDOT Better Utilizing Investments to Leverage Development Transportation Discretionary Grants Program grant (“BUILD Grant”) awarded to the Des Moines Area Metropolitan Planning Organization (“MPO”) for the first phase of a multi-phased project that will mitigate a dangerous low-head dam at Scott Avenue to help facilitate a water recreational trail along and within the Des Moines River within the City of Des Moines (hereinafter “PROJECT”) with an effective date of February 17, 2020 (as may be amended from time to time for additional services, “the Professional Services Agreement”); and

WHEREAS, CIWT operates as a regional public-private partnership for the purpose of implementing a recreational and dam safety plan for 150 miles of water trails throughout Central Iowa; and

WHEREAS, pursuant to the Professional Services Agreement, MERRICK, has developed the project concepts and prepared design and construction plans and specifications, including all documents in whatever media for such designs and models to be used in design and construction of the Project, to the extent related to the Scott Avenue site (“PROJECT Designs and Plans”); and

WHEREAS, the PROJECT, and the resulting PROJECT improvements (“PROJECT improvements”), with the exception of those located within the Des Moines River, are located on property owned or leased by the City of Des Moines, Iowa (“CITY”); and

WHEREAS, the CITY has entered into an Agreement Regarding USDOT Build Grant with CIWT and the MPO regarding the design and construction of the PROJECT Improvements and the CITY’s financial contribution for the PROJECT as part of the BUILD Grant, which CITY agreement requires CIWT to ensure that the CITY obtains an unlimited, non-exclusive, perpetual copyright license to the PROJECT Designs and Plans (“the MPO, CIWT and City BUILD Grant Agreement”); and

WHEREAS, the MPO, CIWT and City BUILD Grant Agreement, references the 28E Agreement between the CITY and CIWT that addresses the governance, operation, maintenance of the regional water trail access points and downtown water trail locations; and provides, with some exceptions, that Landside PROJECT Improvements (as defined in Section 1.8 of the MPO, CIWT and City BUILD Grant Agreement) designed under the MPO, CIWT and City BUILD Grant Agreement will be owned by the CITY and CIWT will own the in-water PROJECT Improvements, as more fully described in Section 4 of the MPO, CIWT and City BUILD Grant Agreement; and

WHEREAS, CIWT is responsible for fully compensating MERRICK for its engineering and design services by CIWT under the Professional Services Agreement and desires to grant the CITY an unlimited, non-exclusive, perpetual copyright license in the PROJECT Designs and Plans as further described below in order for the CITY to maintain, operate and exercise its ownership rights in the PROJECT Improvements.

NOW, THEREFORE, THE PARTIES AGREE AS FOLLOWS:

In consideration of the payment which will be received under the Professional Services Agreement, wherein MERRICK provides engineering and design services for the PROJECT Improvements covered by the PROJECT Designs and Plans, which MERRICK acknowledges as full and good compensation from CIWT for creation of the PROJECT Designs and Plans, and in acknowledgement of the receipt and sufficiency of full consideration for the License rights granted, indemnification and warranty provided to the CITY herein, MERRICK hereby irrevocably grants the City of Des Moines, Iowa, including its assigns, a non-exclusive, unlimited, perpetual, royalty-free, and transferable copyright License to use in any manner and media the PROJECT Designs and Plans, including derivative works and interests therein or related thereto, including:

All designs, drawings, plans, elevations, schedules, diagrams, specifications, studies, surveys, models, sketches, designs, design plans, images, schematics, survey notes, reports, records and other data and documents, in whatever form, completed in full or in part, prepared by MERRICK for any part of the PROJECT Improvements, including without limitation, Instruments of Services. "Instruments of Service" shall have that same meaning as defined in the Professional Services Agreement.

The CITY shall be the owner of all rights to derivative works created by the CITY or its agents under this License, including all right, title and interest, including copyright interest therein.

The CITY agrees that if the design specifications licensed by MERRICK herein are used by the CITY in the construction of another project, the CITY shall indemnify MERRICK against any claim for negligent design relating to such reuse.

MERRICK warrants and represents, that to the best of its knowledge, the above described PROJECT Designs and Plans are original and are free from any claims of intellectual property rights, proprietary rights, or other rights or interests of any third party, including any employee, agent, contractor, sub-consultant, subcontractor, subsidiary or affiliate of MERRICK and that the undersigned has full authority to grant this License. MERRICK warrants that it has obtained all necessary rights to grant this License from its lower-tier contractors. "Lower-tier contractors" shall have that same meaning as defined in the Professional Services Agreement. MERRICK will hold CITY harmless for breach of this warranty.

MERRICK represents and agrees that its services in creating the PROJECT Designs and Plans were performed with that degree of care, skill, and diligence ordinarily exercised under similar conditions and in the performance of projects of a similar nature to the PROJECT by competent members of the engineering professions. MERRICK represents that it has the experience and expertise necessary to provide design and engineering services to result in a functional, operating PROJECT.

MERRICK further represents and warrants that the PROJECT Designs and Plans are designed reasonably and in good faith and in accordance with generally recognized engineering or safety standards or design theories in existence at the time of construction of the PROJECT.

MERRICK agrees to defend, pay on behalf of, indemnify, and hold harmless the City of Des Moines, Iowa, its elected and appointed officials, employees and volunteers and others working on behalf of the CITY in compliance with Attachment 1.

Nothing in this License shall limit any license provided by MERRICK to CIWT under the Professional Services Agreement, or be construed as a breach of such license.

The effective date of this License shall be the on the date of execution by the CITY.

AGREED:

MERRICK & COMPANY

, President

Date

ACCEPTED:

CITY OF DES MOINES, IOWA

T. M. Franklin Cownie, Mayor

Date

Attachment 1 to ATTACHMENT 2

**CITY OF DES MOINES, IOWA
PROFESSIONAL SERVICES – CONSTRUCTION DESIGN**

INDEMNIFICATION REQUIREMENTS

For purposes of this Attachment and all provisions included herein, the term "Consultant" means and includes MERRICK & COMPANY, its officers, agents, employees, subcontractors, subconsultants and others under the control of MERRICK & COMPANY. The term "CITY" means the City of Des Moines, Iowa and its elected and appointed officials, agents, employees and volunteers.

For professional services rendered, to the fullest extent permitted by law, Consultant agrees to pay on behalf of, indemnify, and hold harmless the CITY against any and all claims, demands, suits, damages or losses, together with any and all outlay and expense connected therewith including, but not limited to, attorneys' fees and court costs and actual economic damages that may be recovered from or suffered by the CITY that arise out of any negligent act, error or omission of the Consultant, except to the extent caused by or resulting from the negligent act or omission of the CITY or the CITY'S employees, consultants, agents or others for whom the CITY is responsible.

Consultant's obligation to indemnify the CITY contained in this Agreement is not limited by the amount or type of damages, compensation or benefits payable under any workers' compensation acts, disability benefit acts, or other employee benefits acts.

The CITY shall not be liable or in any way responsible for any injury, damage, liability, claim, loss or expense incurred by Consultant arising out of or in any way connected or associated with Consultant's work, except to the extent caused by or resulting from the negligent act or omission of the CITY or the CITY'S employees, consultants, agents or others for whom the CITY is responsible.

Consultant expressly assumes responsibility for any and all damage caused to CITY property to the extent arising out of or in any way connected or associated with Consultant's work.

Consultant shall ensure that its activities on CITY property will be performed and supervised by adequately trained and qualified personnel and Consultant will observe all applicable safety rules.

ATTACHMENT 2

UNLIMITED, NON-EXCLUSIVE LICENSE OF COPYRIGHT RIGHTS TO DESIGN AND DESIGN DOCUMENTS FOR PROSPECT PARK, BIRDLAND MARINA, AND HARRIET STREET CORRIDOR BUILD GRANT IMPROVEMENTS

WHEREAS, Central Iowa Water Trails, LLC, an Iowa limited liability company, located at 6900 Westown Parkway, West Des Moines, Iowa 50266 (“CIWT”) and I & S Group, Inc., a Minnesota corporation (hereafter ISG, Inc.) located at 2033 Autumn Place, Roseville MN 55113, have entered into an Agreement for Professional Services for engineering and design services for on land and in-water improvements for Prospect Park, Birdland Marina, and the Harriet Street Corridor as part of the implementation of a USDOT Better Utilizing Investments to Leverage Development Transportation Discretionary Grants Program grant (“BUILD Grant”) awarded to the Des Moines Area Metropolitan Planning Organization (“MPO”) for the first phase of a multi-phased project that will mitigate a dangerous low-head dam at Scott Avenue to help facilitate a water recreational trail, and enhance access points at Prospect Park, Birdland Marina and Harriet Street along the Des Moines River within the City of Des Moines (hereinafter “PROJECT”) with an effective date of March 16, 2020 (as may be amended from time to time for additional services, “the Professional Services Agreement”); and

WHEREAS, CIWT operates as a regional public-private partnership for the purpose of implementing a recreational and dam safety plan for 150 miles of water trails throughout Central Iowa; and

WHEREAS, pursuant to the Professional Services Agreement, ISG, Inc. has developed the project concepts and prepared design and construction plans and specifications, including all documents in whatever media for such designs and models to be used in design and construction of the Project, as further described in the Professional Services Agreement (“PROJECT Designs and Plans”); and

WHEREAS, the PROJECT, and the resulting PROJECT improvements (“PROJECT Improvements”), with the exception of those located within the Des Moines River, are located on property owned or leased by the City of Des Moines, Iowa (“CITY”); and

WHEREAS, the CITY has entered into an Agreement Regarding USDOT Build Grant with CIWT and the MPO regarding the design and construction of the PROJECT Improvements and the CITY’s financial contribution for the PROJECT as part of the BUILD Grant, which CITY agreement requires CIWT to ensure that the CITY obtains an unlimited, non-exclusive, perpetual copyright license to the PROJECT Designs and Plans (“the MPO, CIWT and City BUILD Grant Agreement”); and

WHEREAS, the MPO, CIWT and City BUILD Grant Agreement references the 28E Agreement between the CITY and CIWT that addresses the governance, operation, maintenance of the regional water trail access points and downtown water trail locations; and provides, with some exceptions, that Landside PROJECT Improvements (as defined in Section 1.8 of the MPO, CIWT and City BUILD Grant Agreement) designed under the MPO, CIWT and City BUILD Grant Agreement will be owned by the

CITY and CIWT will own the in-water PROJECT Improvements, as more fully described in Section 4 of the MPO, CIWT and City BUILD Grant Agreement; and

WHEREAS, CIWT is responsible for fully compensating ISG, Inc. for its engineering and design services under the Professional Services Agreement and desires to grant the CITY an unlimited, non-exclusive, perpetual copyright license in the PROJECT Designs and Plans as further described below in order for the CITY to maintain, operate and exercise its ownership rights in the PROJECT Improvements.

NOW, THEREFORE, THE PARTIES AGREE AS FOLLOWS:

In consideration of the payment which will be received under the Professional Services Agreement, wherein ISG, Inc. provides engineering and design services for the PROJECT Improvements covered by the PROJECT Design and Plans, which ISG, Inc. acknowledges as full and good compensation from CIWT for creation of the PROJECT Designs and Plans, and in acknowledgement of the receipt and sufficiency of full consideration for the License rights granted, indemnification and warranty provided to the CITY herein, ISG, Inc. hereby irrevocably grants the City of Des Moines, Iowa, including its assigns, a non-exclusive, unlimited, perpetual, royalty-free, and transferable copyright License to use in any manner and media the PROJECT Designs and Plans, including derivative works and interests therein or related thereto, including:

All designs, drawings, plans, elevations, schedules, diagrams, specifications, studies, surveys, models, sketches, designs, design plans, images, schematics, survey notes, reports, records and other data and documents, in whatever form, completed in full or in part, prepared by ISG, Inc. for any part of the PROJECT Improvements.

The CITY shall be the owner of all rights to derivative works created by the CITY or its agents under this License, including all right, title and interest, including copyright interest therein.

The CITY agrees that if the design specifications licensed by ISG, Inc. herein are used by the CITY in the construction of another project, the CITY shall indemnify ISG, Inc. against any claim for negligent design relating to such reuse.

ISG, Inc. warrants and represents, that to the best of its knowledge, the above described PROJECT Designs and Plans are original and are free from any claims of intellectual property rights, proprietary rights, or other rights or interests of any third party, including any employee, agent, contractor, sub-consultant, subcontractor, subsidiary or affiliate of ISG, Inc. and that the undersigned has full authority to grant this License. ISG, Inc. will hold CITY harmless for breach of this warranty.

ISG, Inc. represents and agrees that its services in creating the PROJECT Designs and Plans were performed with that degree of care, skill, and diligence ordinarily exercised under similar conditions and in the performance of projects of a similar nature to the PROJECT by competent members of the engineering professions. ISG, Inc. represents that it has the experience and expertise necessary to provide design and engineering services to result in a functional, operating PROJECT.

ISG, Inc. further represents and warrants that the PROJECT Designs and Plans are designed reasonably and in good faith and in accordance with generally recognized engineering or safety standards or design theories in existence at the time of construction of the PROJECT.

ISG, Inc. agrees to defend, pay on behalf of, indemnify, and hold harmless the City of Des Moines, Iowa, its elected and appointed officials, employees and volunteers and others working on behalf of the CITY in compliance with Attachment 1.

Nothing in this License shall limit any license provided by ISG to CIWT under the Professional Services Agreement, or be construed as a breach of such license.

The effective date of this License shall be the on the date of execution by the CITY.

AGREED:

I & S GROUP, INC.

, President

Date

ACCEPTED:

CITY OF DES MOINES, IOWA

T. M. Franklin Cownie, Mayor

Date

Attachment 1 to ATTACHMENT 2

CITY OF DES MOINES, IOWA PROFESSIONAL SERVICES – CONSTRUCTION DESIGN

INDEMNIFICATION REQUIREMENTS

For purposes of this Attachment and all provisions included herein, the term "Consultant" means and includes ISG, Inc., its officers, agents, employees, subcontractors, subconsultants and others under the control of ISG, Inc. The term "CITY" means the City of Des Moines, Iowa and its elected and appointed officials, agents, employees and volunteers.

For professional services rendered, to the fullest extent permitted by law, Consultant agrees to pay on behalf of, indemnify, and hold harmless the CITY against any and all claims, demands, suits, damages or losses, together with any and all outlay and expense connected therewith including, but not limited to, attorneys' fees and court costs and actual economic damages that may be recovered from or suffered by the CITY that arise out of any negligent act, error or omission of the Consultant, except to the extent caused by or resulting from the negligent act or omission of the CITY or the CITY'S employees, consultants, agents or others for whom the CITY is responsible.

Consultant's obligation to indemnify the CITY contained in this Agreement is not limited by the amount or type of damages, compensation or benefits payable under any workers' compensation acts, disability benefit acts, or other employee benefits acts.

The CITY shall not be liable or in any way responsible for any injury, damage, liability, claim, loss or expense incurred by Consultant arising out of or in any way connected or associated with Consultant's work, except to the extent caused by or resulting from the negligent act or omission of the CITY or the CITY'S employees, consultants, agents or others for whom the CITY is responsible.

Consultant expressly assumes responsibility for any and all damage caused to CITY property to the extent arising out of or in any way connected or associated with Consultant's work.

Consultant shall ensure that its activities on CITY property will be performed and supervised by adequately trained and qualified personnel and Consultant will observe all applicable safety rules.

**ATTACHMENT 3
CONTRACTOR INSURANCE**

**SPECIAL PROVISIONS
FOR
INSURANCE REQUIREMENTS**

THE STANDARD SPECIFICATIONS, SERIES 2015, ARE AMENDED BY THE FOLLOWING MODIFICATIONS AND ADDITIONS. THESE ARE SPECIAL PROVISIONS AND THEY SHALL PREVAIL OVER THOSE PUBLISHED IN THE STANDARD SPECIFICATIONS.

The insurance limits listed in Article 1107.02, C, of the Standard Specifications, are modified as noted below:

1. WORKERS COMPENSATION:

a.	State: \$	Statutory	
b.	Applicable Federal	\$	Statutory
c.	Employer's Liability		
	i.	Bodily Injury by Accident: (Each Accident)	\$ 500,000
	ii.	Bodily Injury by Disease: (Each Employee)	\$ 500,000
	iii.	Policy Limit	\$ 500,000

2. CONTRACTOR'S GENERAL LIABILITY

a.	General Aggregate	\$	2,000,000
b.	Products – Completed Operations Aggregate	\$	2,000,000
c.	Personal and Advertising Injury (Per Person/ Organization)	\$	1,000,000
d.	Each Occurrence (Bodily Injury and Property Damage)	\$	1,000,000
e.	Fire Legal Liability Damage Limit (Any One Fire)	\$	50,000
f.	Medical Expense Limit (Any One Person)	\$	5,000
g.	Property Damage liability insurance will provide Explosion, Collapse, and Underground coverages.		
h.	Railroad protective insurance		
	i.	Each Occurrence	\$ 0
	ii.	Aggregate	\$ 0
i.	Umbrella Liability		See Section 6n.
i.	Excess Umbrella Liability		See Section 7.

3. AUTOMOBILE LIABILITY

a.	Bodily Injury:		
	i.	Each Person	\$ 1,000,000
	ii.	Each Accident	\$ 1,000,000
b.	Property Damage:		
	i.	Each Accident	\$ 1,000,000
c.	Combined Single Limit of	\$	1,000,000
d.	Policy shall include contractual liability coverage and coverage on all owned, non-owned and hired vehicles.		

4. CONTRACTUAL LIABILITY

a.	Bodily Injury:		
	i.	Each Accident	\$ 1,000,000
	ii.	Annual Aggregate	\$ 2,000,000
b.	Property Damage:		
	i.	Each Accident	\$ 1,000,000
	ii.	Annual Aggregate	\$ 2,000,000

5. ADDITIONAL INSURANCES

- a. Umbrella - See Section 6n.
- b. Rider covering traffic control operations.
Any providers of signs, barricades, lights, or other traffic control devices must show evidence of insurance.

6. ADDITIONAL INSURED

- a. All Contractor's, subcontractors, and independent contractor's liability insurance policies and certificates of insurance shall specifically indicate, by name, the additional insureds, which are to include: the City of Des Moines, Iowa and its officers and employees (CITY) and the Des Moines Area Metropolitan Planning Organization and its officers and employees (MPO).
- b. Additional Insured Endorsement – Contractor shall purchase and maintain liability insurance, as described above, specifically naming as additional insureds the CITY and MPO.
- c. General Aggregate Limits specified above shall apply separately to this Project by attachment of Additional Insured Endorsement, Governmental Immunities Endorsement, and Cancellation and Material Changes Endorsement, text as given below
 - i. The CITY, including all its elected and appointed officials, all its employees and volunteers, all its boards, commissions and/or authorities and their board members, employees, and volunteers, as well as the MPO, are included as Additional Insureds with respect to liability arising out the Insured's work and/or services performed for the CITY or MPO. This coverage shall be primary to the Additional Insureds, and not contributing with any other insurance or similar protection available to the Additional Insureds, whether available coverage be primary, contributing or excess.
 - ii. Nonwaiver of Government Immunity. The insurance carrier expressly agrees and states that the purchase of this policy and the including of the City of Des Moines, Iowa as an Additional Insured does not waive any of the defenses of governmental immunity available to the City of Des Moines, Iowa under Code of Iowa Section 670.4 as it now exists and as it may be amended from time to time.
 - iii. Claims Coverage. The insurance carrier further agrees that this policy of insurance shall cover only those claims not subject to the defense of governmental immunity under the Code of Iowa Section 670.4 as it now exists and as may be amended from time to time.
 - iv. Assertion of Government Immunity. The City of Des Moines, Iowa shall be responsible for asserting any defense of governmental immunity, and may do so at any time and shall do so upon the timely written request of the insurance carrier. Nothing contained in this endorsement shall prevent the carrier from asserting the defense of governmental immunity on behalf of the City of Des Moines, Iowa.
 - v. Non-Denial of Coverage. The insurance carrier shall not deny coverage under this policy and the insurance carrier shall not deny any of the rights and benefits accruing to the City of Des Moines, Iowa under this policy for reasons of governmental immunity unless and until a court of competent jurisdiction has ruled in favor of the defense(s) of governmental immunity asserted by the City of Des Moines, Iowa.
 - vi. No Other Change in Policy. The insurance carrier and the City of Des Moines, Iowa agree that the above preservation of governmental immunities shall not otherwise change or alter the coverage available under the policy.
 - vii. Cancellation and Material Changes Endorsement: 30 days Advance Written Notice of Cancellation, Non-Renewal, Reduction in insurance coverage and/or limits and 10 days written notice of non-payment of premium shall be sent to City of Des Moines Risk Management, 400 Robert D Ray Drive, Des Moines, IA 50309. This endorsement supersedes the standard cancellation statement on the Certificate of Insurance to which this endorsement is attached.
- j. Contractor shall, prior to the start of any Work on the Project by any Subcontractor, confirm and verify that Contractor has received a certificate of insurance from each Subcontractor specifically:

- i. naming CITY and MPO as additional insureds, under each subcontractors' policy of insurance and;
 - ii. that each subcontractors' policy of insurance naming City of Des Moines, Iowa and its officers and employees as additional insureds specifically includes the additional Insured Endorsement language as required by paragraph 6.c. above.
- k. Contractor shall, prior to the start of any Work on the Project by Contractor or by any Subcontractor, submit to City of Des Moines, Iowa:
 - i. a certificate of insurance for Contractor in compliance with the above paragraphs 6.b. through 6.c.
 - ii. a certificate of insurance for each Subcontractor in compliance with paragraph 6.j.i. and 6.j.ii.
- l. That failure of Contractor or Subcontractor to comply with the above requirements with respect to the Additional Insured Endorsement and/or Certificate of Insurance, shall not be construed as waiver of those provisions by CITY or MPO.
- m. The stated limits above can be obtained through individual policies or if Contractor desires to reduce underlying limits to minimums required by its insurance carrier, an umbrella policy must accordingly be provided to maintain overall total level of coverage. Any umbrella insurance shall be written on an occurrence basis and pay on behalf form and shall include the same endorsements and additional insureds as required of the primary policies.

7. UMBRELLA:

- a. An excess umbrella policy (pay on behalf form) with Limits of \$5,000,000 for Employer's Liability, Contractor's General Liability, (bodily injury, personal injury, and property damage), Automobile Liability and Contractual Liability on a combined basis shall be provided. Any Excess insurance shall be written on an occurrence basis and pay on behalf form and shall include the same endorsements and additional insured as required of the primary policies.
- b. Policy shall include City of Des Moines, Iowa and its officers and employees, and any others required as additional insureds.
- c. The types of insurance and the limits of liability indicated are the minimum required. The City of Des Moines, Iowa and its officers and employees does not warrant the adequacy of the types of insurance, or the limits of liability required. Any policy exclusions shall be indicated on the insurance certificate. All insurance shall be provided on an occurrence form basis. Insurance certificate(s) must clearly disclose, on its face, that coverage is on an occurrence basis and that it cannot be cancelled or materially altered without giving the City of Des Moines, Iowa written notice 30 calendar days prior to cancellation or alteration.

8. INDEMNIFICATION:

To the fullest extent permitted by law, CONTRACTOR agrees to defend, pay on behalf of, indemnify, and hold harmless the CITY and MPO against any and all claims, demands, suits, damages or losses, together with any and all outlay and expense connected therewith including, but not limited to, attorneys' fees and court costs that may be asserted or claimed against, recovered from or suffered by the CITY or MPO by reason of any injury or loss including, but not limited to, personal injury, bodily injury including death, property damage including loss of use thereof, and economic damages that arise out of or are in any way connected or associated with CONTRACTOR'S work or services under this Contract, including that of its officers, agents, employees, subcontractors and others under the control of CONTRACTOR, except to the extent caused by or resulting from the negligent act or omission of the CITY, MPO or their respective employees, consultants, agents or others for whom they are respectively responsible.

CONTRACTOR'S obligation to indemnify the CITY and MPO contained in this Contract is not limited by the amount or type of damages, compensation or benefits payable under any workers' compensation acts, disability benefit acts, or other employee benefits acts.

Neither the CITY or MPO shall be liable or in any way responsible for any injury, damage, liability, claim, loss or expense incurred by CONTRACTOR arising out of or in any way connected or associated with CONTRACTOR'S work or services, including that of its officers, agents, employees, subcontractors and others under the control of CONTRACTOR, except to the extent caused by or resulting from the negligent act or omission of the CITY, MPO or their respective employees, consultants, agents or others for whom they are respectively responsible.

CONTRACTOR expressly assumes responsibility for any and all damage caused to CITY property arising out of or in any way connected or associated with CONTRACTOR'S work or services under this Contract, including that of its officers, agents, employees, subcontractors and others under the control of CONTRACTOR.

CONTRACTOR shall ensure that its activities on CITY property will be performed and supervised by adequately trained and qualified personnel and CONTRACTOR will observe all applicable safety rules.

ATTACHMENT 4

**CONTRACTOR
UNLIMITED, NON-EXCLUSIVE LICENSE OF COPYRIGHT RIGHTS TO
CONSTRUCTION DOCUMENTS FOR SCOTT AVENUE DAM, PROSPECT PARK,
BIRDLAND MARINA AND HARRIET STREET IMPROVEMENTS
AND
WARRANTY AND INDEMNIFICATION FOR SAME**

WHEREAS, Des Moines Metropolitan Planning Organization, a unit of local government pursuant to Iowa Code Chapter 28E (“MPO”) and _____ (CONTRACTOR) _____, an _____ (State) corporation located at _____ (“CONTRACTOR”), have entered into an Agreement for construction of on land and in-water improvements for Scott Avenue Dam, Prospect Park, Birdland Marina, and the Harriet Street Corridor as part of the implementation of a USDOT Better Utilizing Investments to Leverage Development Transportation Discretionary Grants Program grant (“BUILD Grant”) awarded to the Des Moines Area Metropolitan Planning Organization (“MPO”) for the first phase of a multi-phased project that will mitigate a low-head dam at Scott Avenue and enhance access points at Prospect Park, Birdland Marina and Harriet Street along the Des Moines River within the City of Des Moines to facilitate water recreational trail (hereinafter “PROJECT”) with an effective date of/dated _____, 2021 (“the Construction Agreement”); and

WHEREAS, pursuant to the BUILD Grant Agreement and the Sub-Agreement between the MPO and the Iowa Department of Transportation, the MPO is the contracting authority and remains in responsible charge for the PROJECT construction; and

WHEREAS, pursuant to the Construction Agreement, CONTRACTOR has prepared construction plans and documentation, including shop drawings and other documents in whatever media to be used in construction of the Project (“PROJECT Construction Documents”); and

WHEREAS, the PROJECT, and the resulting PROJECT improvements (“PROJECT Improvements”), with the exception of those located within the Des Moines River, are located on property owned or leased by the City of Des Moines, Iowa (“CITY”); and

WHEREAS, the CITY has entered into an Agreement with CIWT and the MPO regarding the design and construction of the PROJECT Improvements and the CITY’s financial contribution for the PROJECT as part of the BUILD Grant, which agreement requires MPO to ensure that the CITY obtains an unlimited, non-exclusive, perpetual copyright license to the PROJECT Designs and Plans (“the MPO, CIWT and City BUILD Grant Agreement”); and

WHEREAS, the MPO, CIWT and City BUILD Grant Agreement, references the 28E Agreement between the CITY and CIWT that addresses the governance, operation, maintenance of the regional water trail access points and downtown water trail locations; and provides, with

some exceptions, that land-based PROJECT Improvements designed under the Agreement will be owned by the CITY and CIWT will own the in-water PROJECT Improvements, as more fully described in the MPO, CIWT and City BUILD Grant Agreement; and

WHEREAS, MPO is responsible for fully compensating CONTRACTOR for PROJECT construction and PROJECT Construction Documents under the Construction Agreement and desires to grant the CITY an unlimited, non-exclusive, perpetual copyright license in the PROJECT Construction Documents as further described below in order for the CITY to maintain, operate and exercise its ownership rights in the PROJECT Improvements.

NOW, THEREFORE, THE PARTIES AGREE AS FOLLOWS:

In consideration of the payment which will be received under the Construction Agreement, wherein CONTRACTOR provides construction and construction services for the PROJECT Improvements, which CONTRACTOR acknowledges as full and good compensation from MPO for creation of the PROJECT Construction Documents, and in acknowledgement of the receipt and sufficiency of full consideration for the License rights granted, indemnification and warranty provided to the CITY herein, CONTRACTOR hereby irrevocably grants the City of Des Moines, Iowa, including its assigns, a non-exclusive, unlimited, perpetual, royalty-free, and transferable copyright License to use, reproduce, distribute, adapt, prepare derivative works of and publish for the purpose of construction, bidding, operating and maintaining, altering and adding to the PROJECT, the PROJECT final Construction Documents, created by CONTRACTOR or its sub-contractors pursuant to the Construction Agreement:

All final PROJECT Construction Documents, including plans, elevations, schedules, diagrams, specifications, studies, plans, images, schematics, survey notes, reports, records and other documents, in whatever form, prepared by CONTRACTOR or its sub-contractors for the PROJECT, including without limitation, shop drawings.

The CITY shall be the owner of all rights to derivative works created by the CITY or its agents under this License, including all right, title and interest, including copyright interest therein.

CONTRACTOR shall not be responsible to the CITY for use of the PROJECT Construction Documents for a project other than the PROJECT Construction Documents and the purpose for which the Construction Documents were prepared.

CONTRACTOR warrants and represents, that to the best of its knowledge, the above described PROJECT construction plans are original and are free from any claims of intellectual property rights, proprietary rights, or other rights or interests of any third party, including any employee, agent, contractor, sub-consultant, subcontractor, subsidiary or affiliate of CONTRACTOR and that the undersigned has full authority to grant this License. CONTRACTOR will hold CITY harmless for breach of this warranty.

CONTRACTOR represents and agrees that its services in creating the PROJECT construction plans and in performing construction of the PROJECT were performed with that degree of care, skill, and diligence ordinarily exercised under similar conditions and in the

performance of projects of a similar nature to the PROJECT by competent members of the construction industry/ professions. CONTRACTOR represents that it has the experience and expertise necessary to provide construction and construction plan services to result in a functional, operating PROJECT.

CONTRACTOR further represents and warrants that the PROJECT was constructed reasonably and in good faith, in accordance with generally recognized engineering or safety standards or design theories in existence at the time of construction of the PROJECT.

CONTRACTOR agrees to defend, pay on behalf of, indemnify, and hold harmless the City of Des Moines, Iowa, its elected and appointed officials, employees and volunteers and others working on behalf of the CITY in compliance with Attachment 1.

The effective date of this License shall be on the date of execution by the CITY.

AGREED:

CONTRACTOR

, President

Date

ACCEPTED:

CITY OF DES MOINES, IOWA

T. M. Franklin Cownie, Mayor

Date

Attachment 1 to ATTACHMENT 4

**CITY OF DES MOINES, IOWA
CONSTRUCTION**

INDEMNIFICATION REQUIREMENTS

To the fullest extent permitted by law, CONTRACTOR agrees to defend, pay on behalf of, indemnify, and hold harmless the CITY and MPO against any and all claims, demands, suits, damages or losses, together with any and all outlay and expense connected therewith including, but not limited to, attorneys' fees and court costs that may be asserted or claimed against, recovered from or suffered by the CITY or MPO by reason of any injury or loss including, but not limited to, personal injury, bodily injury including death, property damage including loss of use thereof, and economic damages that arise out of or are in any way connected or associated with CONTRACTOR'S work or services under this Contract, including that of its officers, agents, employees, subcontractors and others under the control of CONTRACTOR, except to the extent caused by or resulting from the negligent act or omission of the CITY, MPO or their respective employees, consultants, agents or others for whom they are respectively responsible.

CONTRACTOR'S obligation to indemnify the CITY and MPO contained in this Contract is not limited by the amount or type of damages, compensation or benefits payable under any workers' compensation acts, disability benefit acts, or other employee benefits acts.

Neither the CITY or MPO shall be liable or in any way responsible for any injury, damage, liability, claim, loss or expense incurred by CONTRACTOR arising out of or in any way connected or associated with CONTRACTOR'S work or services, including that of its officers, agents, employees, subcontractors and others under the control of CONTRACTOR, except to the extent caused by or resulting from the negligent act or omission of the CITY, MPO or their respective employees, consultants, agents or others for whom they are respectively responsible.

CONTRACTOR expressly assumes responsibility for any and all damage caused to CITY property arising out of or in any way connected or associated with CONTRACTOR'S work or services under this Contract, including that of its officers, agents, employees, subcontractors and others under the control of CONTRACTOR.

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