

AGREEMENT REGARDING  
MAINTENANCE OF DRAINAGE AND FLOOD CONTROL IMPROVEMENTS FOR  
BRIGHTON SOUTH OUTFALL

Agreement No. 23-04.24  
Project No. 109727

THIS AGREEMENT, by and between URBAN DRAINAGE AND FLOOD CONTROL DISTRICT D/B/A MILE HIGH FLOOD DISTRICT (hereinafter called "DISTRICT") and CITY OF BRIGHTON (hereinafter called "PROJECT SPONSOR") and collectively known as "PARTIES";

WITNESSETH:

WHEREAS, DISTRICT, in a policy statement previously adopted (Resolution No. 14, Series of 1970 and Resolution No. 11, Series of 1973) expressed an intent to assist public bodies which have heretofore enacted floodplain regulation measures; and

WHEREAS, PARTIES now desire to proceed with the maintenance of drainage and flood control improvements for the Brighton South Outfall (hereinafter called "PROJECT"); and

WHEREAS, DISTRICT's Board of Directors reviewed and authorized expenditures for the 2023 Maintenance Work Program (Resolution No. 92, Series of 2022); and

WHEREAS, the Parties previously entered into Agreement No. 19-05.22 and Agreement No. 19-05.22A where the PROJECT SPONSOR contributed a total of \$550,000 combined for maintenance and funds remain in the special project fund for those agreements; and

WHEREAS, any remaining maintenance obligations under Agreement No. 19-05.22 and Agreement No. 19-05.22A will be subsumed into Agreement No. 23-04.24; and

WHEREAS, City Council of PROJECT SPONSOR and the Board of Directors of DISTRICT have authorized, by appropriation or resolution, all of PROJECT costs of the respective PARTIES.

NOW, THEREFORE, in consideration of the mutual promises contained herein, PARTIES hereto agree as follows:

Part 1

1.01 SCOPE OF THIS AGREEMENT

This Agreement defines the responsibilities and financial commitments of PARTIES with respect to PROJECT.

1.02 SCOPE OF PROJECT

PROJECT shall include construction by DISTRICT of the drainage and flood control improvements per the scope below:

- A. Engineering Studies. PROJECT shall include regional planning studies to direct further design, construction and maintenance activities along the Brighton South Outfall.
- B. Design. PROJECT shall include the engineering design of improvements for the Brighton South Outfall.
- C. Construction. PROJECT shall include construction by PARTIES of the drainage and flood control improvements as set forth in regional planning studies and design.
- D. Maintenance. PROJECT shall include maintenance of the Brighton South Outfall.

Project limits are as shown on Exhibit A.

1.03 PUBLIC NECESSITY

PARTIES agree that the work performed pursuant to this Agreement is necessary for the health, safety, comfort, convenience, and welfare of all the people of the State, and is of particular benefit to the inhabitants of DISTRICT and the property therein.

1.04 PROJECT COSTS AND ALLOCATION OF COSTS

- A. It is understood that PROJECT costs as defined above are not to exceed \$279,282.01 without amendment to this Agreement.
- B. At the request of PROJECT SPONSOR, the following funds will be transferred to PROJECT from a separate special fund held by DISTRICT:  
 Project Name: Brighton South Outfall From 2nd Avenue to Fulton Ave  
 Project No: 107679              Amount: \$279,282.01  
 (PROJECT SPONSOR - \$274,282.86; DISTRICT - \$4,999.15)
- C. Based on total PROJECT costs, the maximum percent and dollar contribution by each party shall be:

	<u>Percentage Share</u>	<u>Special Funds Transfer</u>	<u>Maximum Contribution</u>
DISTRICT	1.79%	\$4,999.15	\$4,999.15
PROJECT SPONSOR	98.21%	\$274,282.86	\$274,282.86
TOTAL	100.00%	\$279,282.01	\$279,282.01

1.05 MANAGEMENT OF FINANCES

As set forth in DISTRICT policy (Resolution No. 11, Series of 1973, Resolution No. 49, Series of 1977, and Resolution No. 37, Series of 2009), the funding of a local body's one-half share may come from its own revenue sources or from funds received from state, federal, or other sources of funding without limitation and without prior DISTRICT approval.

Payment of each party's full share (PROJECT SPONSOR - \$274,282.86; DISTRICT - \$4,999.15) shall be transferred from the special funds held for Agreement No. 19-05-22 and Agreement No. 19-05.22A and such request for transfer shall be made subsequent to execution of this Agreement and within 30 days of request for payment by DISTRICT. The payments by PARTIES shall be held by DISTRICT in a special fund to pay for increments of PROJECT as authorized by PARTIES, and as defined herein. DISTRICT shall provide a periodic accounting of PROJECT funds as well as a periodic notification to PROJECT SPONSOR of any unpaid obligations. Any interest earned by the monies contributed by PARTIES shall be accrued to the special fund established by DISTRICT for PROJECT and such interest shall be used only for PROJECT upon approval by the contracting officers (Paragraph 13).

Within one year of completion of PROJECT if there are monies including interest earned remaining which are not committed, obligated, or disbursed, each party shall receive a share of such monies, which shares shall be computed as were the original shares; or, at PROJECT SPONSOR request, PROJECT SPONSOR share of remaining monies shall be transferred to another special fund held by DISTRICT.

1.06 OWNERSHIP OF PROPERTY AND LIMITATION OF USE

PARTIES acknowledge that PROJECT SPONSOR owns the property on which PROJECT is constructed either in fee or non-revocable easement and shall be responsible for same. It is specifically understood that the right-of-way is being used for drainage and flood control purposes. The properties upon which PROJECT is constructed shall not be used for any purpose that shall diminish or preclude its use for drainage and flood control purposes. PROJECT SPONSOR may not dispose of or change the use of the properties to diminish or preclude its use for drainage and flood control purposes without approval of DISTRICT, which shall not be unreasonably withheld.

If, in the future, PROJECT SPONSOR disposes of any portion of or all of the properties acquired upon which PROJECT is constructed pursuant to this Agreement; changes the use to diminish or preclude its use for drainage and flood control purposes of any portion or all of the properties upon which PROJECT is constructed pursuant to this Agreement; or modifies any of the improvements located on any portion of the properties upon which PROJECT is constructed to diminish or preclude its use for drainage and flood control purposes pursuant to this Agreement; and PROJECT SPONSOR has not obtained the written approval of DISTRICT prior to such action, PROJECT SPONSOR shall take any and all action necessary within their legal authority to reverse said unauthorized activity and return the properties and improvements thereon, acquired and constructed pursuant to this Agreement, to the ownership and condition they were in immediately prior to the unauthorized activity at no expense to DISTRICT. However, PROJECT SPONSOR shall not be responsible for the actions of third parties that would violate the provisions of this Paragraph who may have legal rights in the property as long as PROJECT SPONSOR has taken reasonable action to stop those actions. In the event PROJECT SPONSOR breaches the terms and provisions of this Paragraph 7 and does not voluntarily cure as set forth above, DISTRICT shall have the right to pursue a claim against PROJECT SPONSOR for specific performance of this portion of the Agreement.

#### 1.07 MANAGEMENT OF CONSTRUCTION

- A. Costs. Construction costs shall consist of those costs as incurred by the most qualified contractor(s) including detour costs, licenses and permits, utility relocations, and construction related engineering services as defined in Paragraph 4 of this Agreement.
- B. Construction Management and Payment
  - 1. DISTRICT, with the concurrence of PROJECT SPONSOR, shall administer and coordinate the construction-related work as provided herein.
  - 2. DISTRICT, with concurrence of PROJECT SPONSOR, shall select and award construction contract(s).
  - 3. DISTRICT shall require the contractor to provide adequate liability insurance that includes PROJECT SPONSOR. The contractor shall be required to indemnify PROJECT SPONSOR. Copies of the insurance coverage shall be provided to PROJECT SPONSOR upon request.
  - 4. DISTRICT, with assistance of PROJECT SPONSOR, shall coordinate field surveying; staking; inspection; testing; acquisition of right-of-way; and engineering as required to construct PROJECT. DISTRICT, with assistance of PROJECT SPONSOR, shall assure that construction is performed in accordance with the construction contract documents including approved plans and specifications and shall accurately record the quantities and costs relative thereto. Copies of all inspection reports shall be furnished to PROJECT SPONSOR on a weekly basis upon request. DISTRICT shall retain an engineer to perform all or a part of these duties.
  - 5. DISTRICT, with concurrence of PROJECT SPONSOR, shall contract with and provide the services of the design engineer for basic engineering construction services to include addendum preparation; survey control points; explanatory sketches;

revisions of contract plans; shop drawing review; as-built plans; weekly inspection of work; and final inspection.

6. PARTIES shall have access to the site during construction at all times to observe the progress of work and conformance to construction contract documents including plans and specifications.
  7. DISTRICT shall review and approve contractor billings. DISTRICT shall remit payment to contractor based on billings.
  8. DISTRICT, with concurrence of PROJECT SPONSOR, shall prepare and issue all written change or work orders to the contract documents.
  9. PARTIES shall jointly conduct a final inspection and accept or reject the completed PROJECT in accordance with the contract documents.
  10. DISTRICT shall provide PROJECT SPONSOR a set of reproducible "as-built" plans.
- C. Construction Change Orders. In the event that it becomes necessary and advisable to change the scope or detail of the work to be performed under the contract(s), such changes shall be rejected or approved in writing by the contracting officers. No change orders shall be approved that increase the costs beyond the funds available in the PROJECT fund, including interest earned on those funds, unless and until the additional funds needed to pay for the added costs are committed by all PARTIES.

## Part 2

### 2.01 MAINTENANCE

PARTIES agree that PROJECT SPONSOR shall own and be responsible for maintenance of the completed and accepted PROJECT. PARTIES further agree that DISTRICT, at PROJECT SPONSOR's request, shall assist PROJECT SPONSOR with the maintenance of all facilities constructed or modified by virtue of this Agreement to the extent possible depending on availability of DISTRICT funds. Such maintenance assistance shall be limited to drainage and flood control features of PROJECT. Maintenance assistance may include activities such as keeping flow areas free and clear of debris and silt, keeping culverts free of debris and sediment, repairing drainage and flood control structures such as drop structures and energy dissipaters, and clean-up measures after periods of heavy runoff. The specific nature of the maintenance assistance shall be set forth in a memorandum of understanding from DISTRICT to PROJECT SPONSOR, upon acceptance of DISTRICT's annual Maintenance Work Program.

DISTRICT shall have right-of-access to right-of-way and storm drainage improvements at all times for observation of flood control facility conditions and for maintenance when funds are available.

### 2.02 FLOODPLAIN REGULATION

PROJECT SPONSOR agrees to regulate and control the floodplain of the South Platte River within PROJECT SPONSOR in the manner prescribed by the National Flood Insurance Program and prescribed regulations thereto as a minimum.

PARTIES understand and agree, however, that PROJECT SPONSOR cannot obligate itself by contract to exercise its police powers. If PROJECT SPONSOR fails to regulate the floodplain of the South Platte River within PROJECT SPONSOR in the manner prescribed by the National Flood Insurance Program and prescribed regulations thereto as a minimum, DISTRICT may exercise its power to do so and PROJECT SPONSOR shall cooperate fully.

### 2.03 TERM OF AGREEMENT

The term of this Agreement shall commence upon execution and shall terminate three (3) years after the final payment is made to the construction contractor and the final accounting of funds on deposit at DISTRICT is provided to all PARTIES pursuant to Paragraph 5 herein, except for Paragraph 10. FLOODPLAIN REGULATION, Paragraph 7.C. Ownership of Property and Limitation of Use, and Paragraph 9. MAINTENANCE, which shall run in perpetuity.

2.04 LIABILITY

Each party hereto shall be responsible for any suits, demands, costs, or actions at law resulting from its own acts or omissions and may insure against such possibilities as appropriate.

2.05 CONTRACTING OFFICERS AND NOTICES

- A. The contracting officer for PROJECT SPONSOR shall be the City Manager or Designee, 500 South 4<sup>th</sup> Avenue, Brighton, Colorado 80601.
- B. The contracting officer for DISTRICT shall be the Executive Director, 12575 West Bayaud Avenue, Lakewood, CO 80228.
- C. Any notices, demands or other communications required or permitted to be given by any provision of this Agreement shall be given in writing, delivered personally or sent by registered mail, postage prepaid and return receipt requested, addressed to PARTIES at the addresses set forth above or at such other address as either party may hereafter or from time to time designate by written notice to the other party given when personally delivered or mailed, and shall be considered received in the earlier of either the day on which such notice is actually received by the party to whom it is addressed or the third day after such notice is mailed.
- D. The contracting officers for PARTIES each agree to designate and assign a PROJECT representative to act on the behalf of said PARTIES in all matters related to PROJECT undertaken pursuant to this Agreement. Each representative shall coordinate all PROJECT related issues between PARTIES, shall attend all progress meetings, and shall be responsible for providing all available PROJECT-related file information to the engineer upon request by DISTRICT or PROJECT SPONSOR. Said representatives shall have the authority for all approvals, authorizations, notices or concurrences required under this Agreement. However, in regard to any amendments or addenda to this Agreement, said representative shall be responsible to promptly obtain the approval of the proper authority.

2.06 AMENDMENTS

This Agreement contains all of the terms agreed upon by and among PARTIES. Any amendments or modifications to this Agreement shall be in writing and executed by PARTIES hereto to be valid and binding.

2.07 SEVERABILITY

If any clause or provision herein contained shall be adjudged to be invalid or unenforceable by a court of competent jurisdiction or by operation of any applicable law, such invalid or unenforceable clause or provision shall not affect the validity of the Agreement as a whole and all other clauses or provisions shall be given full force and effect.

2.08 APPLICABLE LAWS

Jurisdiction for any and all legal actions regarding this Agreement shall be in the State of Colorado and venue for the same shall lie in the PROJECT SPONSOR where PROJECT is located

2.09 ASSIGNABILITY

No party to this Agreement shall assign or transfer any of its rights or obligations hereunder without the prior written consent of the nonassigning party or parties to this Agreement.

2.10 BINDING EFFECT

The provisions of this Agreement shall bind and shall inure to the benefit of PARTIES hereto and to their respective successors and permitted assigns.

2.11 ENFORCEABILITY

PARTIES hereto agree and acknowledge that this Agreement may be enforced in law or in equity, by decree of specific performance or damages, or such other legal or equitable relief as may be available subject to the provisions of the laws of the State of Colorado.

2.12 TERMINATION OF AGREEMENT

This Agreement may be terminated upon thirty (30) day's written notice by any of PARTIES, but only if there are no contingent, outstanding contracts. If there are contingent, outstanding contracts, this Agreement may only be terminated upon mutual agreement of all PARTIES and only upon the cancellation of all contingent, outstanding contracts. All costs associated with the cancellation of the contingent contracts shall be shared between PARTIES in the same ratio(s) as were their contributions and subject to the maximum amount of each party's contribution as set forth herein.

2.13 EMPLOYMENT STATUS

This Agreement shall not change the employment status of any employees of PARTIES. No party shall have the right to control or direct the activities of any employees of another related to this Agreement.

2.14 PUBLIC RELATIONS

It shall be at PROJECT SPONSOR's sole discretion to initiate and to carry out any public relations program to inform the residents in PROJECT area as to the purpose of PROJECT and what impact it may have on them. Technical and final design recommendations shall be presented to the public by the selected engineer. In any event DISTRICT shall have no responsibility for a public relations program, but shall assist PROJECT SPONSOR as needed and appropriate.

2.15 NO DISCRIMINATION IN EMPLOYMENT

In connection with the performance of work under this Agreement, PARTIES agree not to refuse to hire, discharge, promote or demote, or to discriminate in matters of compensation against any person otherwise qualified because of race, color, ancestry, creed, religion, national origin, gender, age, military status, sexual orientation, gender identity, marital status, or physical or mental disability and further agree to insert the foregoing provision in all subcontracts hereunder.

2.16 APPROPRIATIONS

Notwithstanding any other term, condition, or provision herein, each and every obligation of PROJECT SPONSOR and/or DISTRICT stated in this Agreement is subject to the requirement of a prior appropriation of funds therefore by the appropriate governing body of PROJECT SPONSOR and/or DISTRICT.

2.17 NO THIRD PARTY BENEFICIARIES

It is expressly understood and agreed that enforcement of the terms and conditions of this Agreement, and all rights of action relating to such enforcement, shall be strictly reserved to PARTIES, and nothing contained in this Agreement shall give or allow any such claim or right of action by any other or third person on such Agreement. It is the express intention of PARTIES that

any person or party other than any one of PARTIES receiving services or benefits under this Agreement shall be deemed to be an incidental beneficiary only.

2.18 GOVERNMENTAL IMMUNITIES

PARTIES hereto intend that nothing herein shall be deemed or construed as a waiver by any party of any rights, limitations, or protections afforded to them under the Colorado Governmental Immunity Act (§ 24-10-101, *et seq.*, C.R.S.) as now or hereafter amended or otherwise available at law or equity.

2.19 INTENT OF AGREEMENT

Except as otherwise stated herein, this Agreement is intended to describe the rights and responsibilities of and between PARTIES and is not intended to and shall not be deemed to confer rights upon any person or entities not named as PARTIES, nor to limit in any way the powers and responsibilities of PROJECT SPONSOR, DISTRICT or any other entity not a party hereto.

2.20 EXECUTION IN COUNTERPARTS – ELECTRONIC SIGNATURES

This Agreement, and all subsequent documents requiring the signatures of PARTIES to this Agreement, may be executed in two or more counterparts, each of which shall be deemed an original, but all of which shall constitute one and the same instrument. PARTIES approve the use of electronic signatures for execution of this Agreement, and all subsequent documents requiring the signatures of PARTIES to this Agreement. Only the following two forms of electronic signatures shall be permitted to bind PARTIES to this Agreement, and all subsequent documents requiring the signatures of PARTIES to this Agreement.

A. Electronic or facsimile delivery of a fully executed copy of a signature page; or

B. The image of the signature of an authorized signer inserted onto PDF format documents.

Documents requiring notarization may also be notarized by electronic signature, as provided above.

All use of electronic signatures shall be governed by the Uniform Electronic Transactions Act, CRS §§ 2471.3101 to -121.

WHEREFORE, PARTIES hereto have caused this instrument to be executed by properly authorized signatories as of the date and year written below.

URBAN DRAINAGE AND FLOOD  
CONTROL DISTRICT

D/B/A

MILE HIGH FLOOD DISTRICT

By \_\_\_\_\_

Name Laura A. Kroeger

Title Executive Director

Date \_\_\_\_\_

\_\_\_\_\_  
Checked By

CITY OF BRIGHTON

By \_\_\_\_\_

(SEAL)

ATTEST:

Michael Martinez, City Manager

\_\_\_\_\_  
Natalie Hoel, City Clerk

Date \_\_\_\_\_

APPROVED AS TO FORM:

\_\_\_\_\_  
Alicia Calderón, City Attorney

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Exhibit A

