

**AGREEMENT FOR APPLICATIONS FOR GRANT, DESIGN, AND CONSTRUCTION  
INVOLVING THE KEN MITCHELL CELL 1 DIVERSION STRUCTURE**

THIS AGREEMENT (“Agreement”) is made this \_\_\_\_ day of \_\_\_\_\_, 2020, by and between the CITY OF BRIGHTON, a home rule municipal corporation in the Counties of Adams and Weld, State of Colorado (“City”), and the Brighton Ditch Company, a Nonprofit Corporation, (“BDC”), who together are the “Parties” hereto.

RECITALS

WHEREAS, the City and the BDC desire to work cooperatively to design and construct the South Platte River Bank Stabilization and High Flow Channel Project (the “Project”); and

WHEREAS, the City and the BDC depend upon a forebay in the South Platte River formed by the BDC’s concrete diversion dam and the City’s riverbank. The water level created by this forebay allows diversion of water by the City to the Ken Mitchell Project and allows diversion by the BDC of its water into its irrigation canal. The Project concept is to minimize damage from inevitable large flood events by allowing the flood to go across the City’s riverbank, but to armor that bank and the flood route to make the High Flow Channel. Once the flood subsides, any erosion of the river bank can be economically and quickly restored to support the water level of the essential forebay; and

WHEREAS, it is anticipated that the cost of the work contemplated by this Agreement will exceed \$150,000.00; and

WHEREAS, the City and the BDC intend to fund the Project partially through Grants and will cooperatively work together to complete grant applications; and

WHEREAS, the City and the BDC shall work cooperatively to contract for design services for the Project; and

WHEREAS, the City and the BDC shall work cooperatively to contract for construction of the Project; and

NOW, THEREFORE, for and in consideration of the Premises and the covenants and agreements hereinafter set forth and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the City and BDC hereby mutually covenant and agree as follows:

COVENANTS AND AGREEMENTS

1. The Parties intend to provide for the Grant Application, the Design, and the Construction of the Project, more fully described in the Scope of Work in **Exhibit A**, attached hereto and incorporated herein by this reference.

2. The responsibilities relating to the Grant Application portion of the Project will be as follows.

2.1 The City and the BDC shall jointly apply for the Grants.

2.2 In the event grant applications are not successful, the City and BDC will, within 60 days of the unsuccessful grant application, determine whether or not to proceed.

(a) If the City and BDC decide to proceed with the Project this Agreement must be modified in writing to reflect such decision.

(b) If the City and BDC decided to proceed with the Project all costs associated with the Project shall be split equally.

(c) If the City and BDC decide not to proceed with the Project then, by notice in a form agreed to by the Parties, this Agreement will be terminated.

2.3 If the grant applications are successful, the BDC and the City shall in good faith determine how the grant proceeds are to be applied or used.

3. The responsibilities relating to the Design portion of the Project will be as follows.

3.1 The City shall be responsible for the following obligations in connection with the Design portion of the Project:

(a) The City shall designate an individual responsible for representing the City in coordinating with BDC's Project Manager (the "City's Designated Manager").

(b) Monthly progress payment invoices based upon actual costs incurred by BDC shall be submitted to the City by the BDC monthly. The City shall pay to the BDC the invoiced amount within 30 days of receipt of the invoice, except that ten per cent (10%) of each payment shall be retained by the City until final payment. Final payment shall be made within 30 days of an invoice by the BDC for the final payment following completion of the Design Portion of the Project

(c) BDC may postpone further work if any invoice is disputed or not fully paid within 30 days, until such matter is fully resolved. Any such delay shall automatically extend any applicable deadlines stated or implied in this Agreement.

3.2 The BDC shall be responsible for the following obligations in connection with the Design portion of the Project:

(a) The BDC shall contract for and manage the design of the Project. All contracts pertaining to the Project, and approvals thereof, shall conform with Colorado law and Brighton Municipal Code requirements for public contracts. Prior to entering into such contracts, the BDC shall provide to the City, for the City's approval, actual bids with supporting documentation (including the

proportionate share calculation in the event the contracts cover more than just the Project). After the date the District approves the actual bids for the Project, the BDC shall not enter into any change order to such contracts that would increase the actual bids by more than 10% without prior authorization from the City, which authorization shall not be unreasonably withheld, conditioned or delayed.

(b) Prior to entering into any contracts for the design of the Project, the BDC shall provide the City with the opportunity to provide comments and review contracts for compliance with requirements for public contracts. If the City determines that a contract, or provision(s) of said contract, are not in compliance with the requirements for public contracts, the BDC shall, to the extent said provision(s) directly affect the City, make good faith efforts to amend the provision(s) prior to executing the contract. If the BDC is unable to amend the contract prior to execution the Parties agree that to the extent such provision(s) may affect the City, BDC will not enforce such provisions against the City.

(c) The BDC shall designate a person (Project Manager) responsible for the day-to-day management of the Project.

(d) The BDC shall inform the City in a timely manner of Project schedules, and provide updates within a reasonable timeframe upon the City's request made to the Project Manager.

(e) The BDC shall make all documents related to design, schedule, and cost for the Project available for review by the City at the City's request.

(d) Upon reimbursement to the BDC as set forth herein, the BDC shall release the City and its successors and assigns of any future obligations related to reimbursements for the Project.

4. The responsibilities relating to the Construction portion of the Project will be as follows.

4.1 The City shall be responsible for the following obligations in connection with the Construction portion of the Project:

(a) The City shall designate an individual responsible for representing the City in coordinating with BDC's Project Manager (the "City's Designated Manager").

(b) Monthly progress payment invoices based upon actual costs incurred by BDC shall be submitted to the City by the BDC monthly. The City shall pay to the BDC the invoiced amount within 30 days of receipt of the invoice, except that ten per cent (10%) of each payment shall be retained by the City until final payment. Final payment shall be made within 30 days of an invoice by the BDC for final payment following completion of the Construction Portion of the Project.

(c) BDC may postpone further work if any invoice is disputed or not fully paid within 30 days, until such matter is fully resolved. Any such delay shall automatically extend any applicable deadlines stated or implied in this Agreement.

4.2 The BDC shall be responsible for the following obligations in connection with the Construction portion of the Project:

(a) The BDC shall contract for and manage the construction of the Project. All contracts pertaining to the Project, and approvals thereof, shall conform with Colorado law and Brighton Municipal Code requirements for public contracts. Prior to entering into such contracts, the BDC shall provide to the City, for the City's approval, actual bids with supporting documentation (including the proportionate share calculation in the event the contracts cover more than just the Project). After the date the City approves the actual bids for the Project, the BDC shall not enter into any change order to such contracts that would increase the actual bids by more than 10% without prior authorization from the City, which authorization shall not be unreasonably withheld, conditioned or delayed.

(b) The BDC shall designate a person (Project Manager) responsible for the day-to-day management of the Project.

(c) The BDC shall inform the City in a timely manner of Project schedules, and provide updates within a reasonable timeframe upon the City's request made to the Project Manager.

(d) The BDC shall make all documents related to design schedule and cost for the Project available for review by the City at the City's request.

(e) Upon reimbursement to the BDC as set forth herein, the BDC shall release the City and its successors and assigns of any future obligations related to the Project, and shall provide written final acceptance.

5. Access. BDC and its consultants, contractors, subcontractors and materialmen shall have free access to the site of the Project without further permission or approval by the City. In the event the Project site or portions thereof are secured by locked gates, the City shall provide keys or combinations to sufficient representatives of BDC or its contractors to avoid delays which would be incurred by the need to call for individual access. The above access provisions shall apply to any requirement by the BDC for emergency access to the Project site.

6. Miscellaneous.

6.1 Maintenance and Weed Control. The Parties agree to share any costs of emergency repairs of the Project equally (50% and 50%). The Parties agree that the City will be responsible for any routine maintenance and weed control.

6.2 Laws, Ordinances, and Permits. The Parties shall at all times obey all applicable Federal and State laws and the Brighton City Code.

(a) BDC may submit all contracts with contractors, consultants, materialmen or other persons or entities to the City for review for conformity with this Agreement and with the City Code before executing such contracts. BDC shall have no obligation to proceed with the work or with such contracts until City approval has been issued in writing or by e-mail pursuant to Section 6.7 hereof.

(b) BDC or its contractor shall be responsible to prepare and submit required City permits, but the City shall not charge for those permits.

(c) Any delay resulting from Sections 6.2.(a), 6.2(b) or 6.2(d) shall automatically extend any deadlines stated or implied in this Agreement.

(d) The Parties shall at all times obey all applicable Federal and State laws and the Brighton City Code.

6.3 Liabilities. To the extent authorized by law, each party shall be responsible for the acts, errors, and omissions of their respective employees and agents.

6.4 No Modification. This Agreement may be modified, amended, or changed in whole or in part only by an agreement in writing duly authorized and executed by both Parties with the same formality as this Agreement.

6.5 Remedies For Default. If either Party is in default with respect to any material condition expressed herein, the non-defaulting Party may elect to treat this Agreement as terminated and may seek to recover damages limited to breach of contract only, provided that prior to such termination the non-defaulting Party shall give the defaulting Party written notice of such claim of default and the defaulting Party shall have thirty (30) days thereafter in which to cure such breach or default.

6.6 Termination for Non-Appropriation. Notwithstanding any other provision herein to the contrary, every obligation of the City that involves the expenditure of any resources in a future fiscal year shall be subject to the lawful appropriation of sufficient funds therefore by the Brighton City Council.

6.7 Notice. All notices or demands desired or required under this Agreement shall be deemed given: 1) when personally delivered; or, 2) after the lapse of five (5) days after mailing by registered or certified mail, postage pre-paid; or, 3) when sent by confirmed facsimile and followed by regular mail, postage pre-paid, and addressed as follows:

To City: City of Brighton  
Department of Utilities  
500 S 4<sup>th</sup> Ave  
Brighton, CO 80601

*With a copy to:* City of Brighton  
City Attorney  
500 S 4<sup>th</sup> Ave

Brighton, CO 80601

To BDC: Brighton Ditch Company  
PO Box 185  
Fort Lupton, CO 80621

*With a copy to:* Robert F. T. Krassa  
2300 Canyon Blvd., Suite 2  
Boulder, CO 80302  
bob@krassa.com

or to such other addresses as each Party may designate by written notice given in accordance with this paragraph 6.7.

6.8 No Joint Venture or Partnership. Nothing herein shall be interpreted or construed as creating a joint venture or partnership between the Parties. Neither of the Parties shall have the right under this Agreement to create any obligation or incur any debt on behalf of the City or the BDC.

6.9 No Third Party Benefits Intended. It is expressly understood and agreed that the enforcement of all terms and conditions of this Agreement and all rights and actions relating thereto shall be strictly reserved to the City and the BDC, and nothing herein shall give or allow any claim or right of action to or by any other or third person to this Agreement. It is the intention of the City and the BDC that any person other than the City and the BDC receiving services or benefits under this Agreement shall be deemed to be an incidental beneficiary only.

6.10 Paragraph Headings and Grammatical Rules. The paragraph headings herein are for convenience only and are not intended to govern, limit, or aid in the interpretation of this Agreement. In the interpretation of this Agreement, any gender includes the other; the singular number includes the plural and vice versa; words used in the present tense include the past and future tense and vice versa, unless manifestly inapplicable; and words shall be construed according to context and the normal use of language.

6.11 Integration. This Agreement consists solely of the terms and conditions stated herein, which are intended as a complete integration of all understandings between the Parties concerning the subject matter hereof. No prior or contemporaneous addition or deletion or other document or amendment hereto shall have any force or affect whatsoever unless stated herein or expressly referenced and incorporated herein. No subsequent novation, renewal, addition, deletion or other amendment hereto shall have any force or effect unless embodied in a written contract executed and approved by both parties.

6.12 Binding Agreement. This Agreement and all terms and conditions herein shall extend to and be binding upon the Parties and their respective heirs, successors, and

assigns, provided that this Agreement and the rights and duties contained herein may not be assigned or transferred, by operation of law or otherwise, without the prior written consent of both Parties.

6.13 Joint Drafting. This Agreement is the product and result of the joint efforts of the Parties hereto, each of whom had the advice of legal counsel and an equal opportunity to contribute to its content.

6.14 Non-Waiver. Waiver of the enforcement of any breach of this Agreement by either Party shall not constitute a continuing waiver of any subsequent breach by that Party of the same or any other provision of this Agreement.

6.15 Applicable Law and Venue. This Agreement is made and shall be construed in accordance with the laws of the State of Colorado. The Parties stipulate that the proper venue for any court action that might occur in connection with or as a result of this Agreement is Adams County, Colorado.

6.16 No Costs or Fees. In the event of litigation, arbitration, or other dispute resolution process arising out of this Agreement, the Parties agree that each Party shall pay its own costs and expenses, including attorneys' fees.

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

6.18 Power to Contract. Each Party warrants that it has the power to enter into this Agreement and that its signatory is authorized to bind it hereto.

WHEREFORE, the PARTIES affix their signatures as of the above-written date.

CITY OF BRIGHTON, COLORADO

\_\_\_\_\_  
JANE BAIS DISESSA, City Manager

ATTEST:

\_\_\_\_\_  
NATALIE HOEL, City Clerk

APPROVED AS TO FORM:

\_\_\_\_\_  
LENA MCCLELLAND, Acting City Attorney

ATTEST:

BRIGHTON DITCH COMPANY

\_\_\_\_\_  
*Lawrence*

By: Name: Title:

\_\_\_\_\_  
*George Stieber Jr*  
\_\_\_\_\_  
*George Stieber Jr*  
\_\_\_\_\_  
*President*



## **EXHIBIT A**

### ***RESPONSIBILITIES***

#### **GRANT APPLICATION**

Grant Application services consists of writing and preparing a grant to be submitted to the Colorado Water Conservation Board (CWCB). The application will include a statement of Work, Engineer's Estimate of Probable Costs, and associated budget. The application will also include a schedule, maps, letters of commitment for matching funds, photos, and drawings.

#### **DESIGN**

##### **Design will consist of 3 phases**

50% design sheet set which includes a kickoff meeting with all the parties of this agreement, review of the CWCB contract requirements, design approach and schedule, and address any additional feedback on the design alternatives.

90% design sheet set and specifications consists of final hydraulic modeling and construction specifications will be written. The city of Brighton and the Brighton Ditch Company will provide acceptable 'Front End' and contract documents.

100% design sheet set and bid package will include the final bid package, administration during the bid phase and recommendations of the lowest responsive bidder.

#### **CONSTRUCTION**

Following execution of the construction contract, the project team will initiate a construction kickoff meeting with the contractor, the Brighton Ditch Company, and the City of Brighton to discuss project approach and schedule, payment tracking, and field change protocols. The project team will provide daily construction oversight and installed quantity tracking. Following completion on the construction the Project team will provide a set of As-Built drawings and the final report required by the CWCB.