

## **AGREEMENT**

**THIS WATER TANK MAINTENANCE SERVICES AGREEMENT** (hereinafter called “Agreement”) is made as of the \_\_\_\_ day of \_\_\_\_\_, 20\_\_ (the “Effective Date”) by and between the **City of Brighton Water Activity Enterprise** (hereinafter called “Owner” or “Enterprise”) and SEH Design/Build, Inc., with its principal place of business at St. Paul, Minnesota (hereinafter called “SEH D|B”).

In consideration of the agreements hereinafter contained, the parties hereto agree as follows:

### **1. SCOPE OF SERVICES**

The Owner retains SEH D|B to furnish the water system maintenance and repair services set forth on the attached Exhibit “A” (referred to as “Services” or “Work”). SEH D|B agrees to perform the Services in a diligent and workmanlike manner according to the Contract Documents (defined below). SEH D|B shall provide all personnel, supervision, services (including professional engineering sub-consultants), materials, tools, equipment and supplies and do all things necessary for the Water Tank Services and all materials, equipment and improvements ancillary thereto specified on Exhibit “A” (Sometimes referred to herein as “the Project”).

The Project sites bound by this Agreement are:

- 1. 500,000-gallon elevated single pedestal tank (southwest corner of Water Tower Park, Brighton, CO)*
- 2. 3.0-MG ground storage tank (northwest corner of Water Tower Park, Brighton, CO)*
- 3. 8.3-MG ground storage tank (southeast corner of Water Tower Park, Brighton, CO)*
- 4. 5.0-MG ground storage tank (southeast quadrant of Tower Road and East 168<sup>th</sup> Avenue, Brighton, CO)*

The Work to be performed under this Agreement shall be completed in compliance with all applicable codes.

All procurement and construction shall be in accordance with drawings, specifications or other documents to be prepared by SEH D|B in accordance with design premises, performance requirements and other criteria set forth or referenced in the Exhibits hereto. The Work shall be performed as set forth in the Contract Documents, which includes this Agreement and Exhibits, including Exhibit “A” – Schedule and Scope of Services, and Exhibit “B” – Compensation Schedule, and any Change Orders. In the event any ambiguity or conflict between the Contract Documents listed above, the order of precedence shall be the following order: (i) this Agreement (including any Change Orders); (ii) Exhibit “A”, (iii) Exhibit “B”.

### **2. REPRESENTATIVES**

Owner has designated Mr. Curtis Bauers, Utilities Director for the Enterprise (the “Owner Representative”), and SEH D|B has designated Mr. Steve Peterson (the “SEH D|B Representative”). The Owner Representative and the SEH D|B Representative shall be available as often as is reasonably necessary for reviewing the Water Tank Services herein, providing required information or decisions, and for authorizing changes therein as may be required.

### **3. COMPENSATION**

SEH D|B shall be paid annually by the Owner for the services described in paragraph 1 (further described in Exhibit A) in accordance with the amounts designated in Exhibit B for each year of service, inclusive of reimbursable costs. Any Change Order(s) shall be paid according to the terms of such Change Order(s).

#### **4. INVOICING**

- 4.1 The invoice for the first year fee will be submitted upon completion of the work done in the first year. Invoices for the subsequent year fees will be submitted annually thereafter, in the anniversary month of the prior year invoice.
- 4.2 Invoices for any change orders shall be separately mailed and billed as outlined in the Change Order.
- 4.3 Amounts more than 30 days past due shall accrue interest at 1.5% per month. If Work has been properly completed by SEH D|B and the Owner fails to make timely payment, SEH D|B may suspend work until receipt of payment.
- 4.4 The water system maintenance and repair expenses contemplated by this Agreement shall be paid by the Enterprise from gross revenues of the Water Activity Enterprise, derived solely from the operation of its Water System. Nothing in this Agreement shall constitute an indebtedness, debt or obligation of the City of Brighton within the meaning of any constitutional, Charter or statutory provision or limitation.

#### **5. COMPLETION**

SEH D|B has prepared a schedule in the attached Exhibit A that identifies the scope of work and duration of the contract, including the overall contract length and intermediate project milestones and completion dates. This schedule is subject to adjustment as allowed or reasonably required by this Agreement, the Owner, and SEH D|B.

#### **6. SUBCONTRACTING**

The subcontracting of any portion of the Work shall not relieve SEH D|B of primary responsibility for the proper and complete performance of the Work. However, SEH D|B shall have the right to subcontract such portions of the Work as it shall determine to qualified subcontractors, including any affiliates of SEH D|B ("Affiliates"). SEH D|B shall pay all subcontractors and/or Affiliates and shall not cause, suffer or permit any lien or claim of lien to attach or be threatened against the Owner or Project.

#### **7. OWNER RESPONSIBILITIES**

##### **7.1 TELECOMMUNICATIONS**

- 7.1.1 Owner recognizes that any existing telecommunications equipment located on the water tank(s) or appurtenant facilities may interfere with the Work contemplated in this Agreement. If requested by SEH D|B, Owner agrees to request that the owner of any telecommunications equipment located on the water tank(s) or appurtenant facilities remove or protect such telecommunications equipment during the Work. SEH D|B cannot and will not remove any such interfering equipment, and Owner acknowledges that the removal or protection of such equipment by the owner of such equipment may be required prior to the commencement of Work by SEH D|B.
- 7.1.2 Owner may arrange for the reinstallation of the telecommunications equipment after SEH D|B has notified the Owner that rehabilitation work has been completed, or that the work has proceeded to the point where such equipment may be reinstalled. SEH D|B shall have no responsibility for the reinstallation of any telecommunications equipment.
- 7.1.3 Owner acknowledges that SEH D|B cannot be responsible for any damage to any telecommunications equipment during Work or during the removal and reinstallation of any existing equipment by the owner of such equipment; Owner shall cause the owner of any such equipment to accept full responsibility for the removal and/or protection of its equipment.
- 7.1.4 Any additional Work that results from the proposed or actual installation of future telecommunications or other equipment to be anchored to or otherwise attached to the tank

structure or appurtenances is not included as part of this Work. Owner agrees that SEH D|B will have the right to review and inspect any proposed/future telecommunications equipment installations during the term of this Agreement, and may propose a Change Order for any anticipated additional Work. For any such Change Order SEH D|B shall be compensated in accordance with its then current hourly rates for any such additional work as an additional service. SEH D|B shall bill Owner for additional services through a separate invoice for any such additional work, pursuant to a written Change Order.

## 7.2 PROJECT INFORMATION

- 7.2.1 The Owner shall furnish all surveys, record drawings, and other information in Owner's possession and control describing legal limitations, physical conditions, soils and subsurface conditions, and utility locations material to the Work. The Owner shall provide SEH D|B with copies of all prior evaluations, studies, reports, or existing documentation regarding the condition of Water Tanks, or any concerns or complaints regarding the condition or operation of the Tank(s) or other work subject to this Agreement. The Owner shall secure and pay for any necessary permits, approvals, variances, easements, assessments and charges required for the construction, use or occupancy of the Project. If the Owner becomes aware of any fault or defect in the Project, it shall give prompt notice thereof to SEH D|B.

## 8. INDEMNIFICATION

To the fullest extent permitted by law, SEH D|B agrees to defend and indemnify the Owner, and its officers, employees, agents, contractors, volunteers and public officials, from and against all claims, damages, losses, lien claims and expenses, including attorney fees, to the extent caused by the negligent, or otherwise wrongful act or omission, including breach of a specific contractual duty, of SEH D|B, its employees, agents, contractors, or delegates under this Agreement.

## 9. INSURANCE

SEH D|B shall secure and maintain such insurance as will protect SEH D|B from claims under the Worker's Compensation Acts, automobile liability, and from claims for bodily injury, death, or property damage which may arise from the performance of services under this Agreement, and shall cause all subcontractors, sub-consultants and Affiliates who work on the Project to obtain and maintain such insurance. Such insurance shall be written for the minimum amounts required by the City of Brighton Procurement Department and not less than:

Commercial General Liability	\$1,000,000 each occurrence/aggregate
Automobile Liability	\$1,000,000 combined single limit
Excess/Umbrella Liability	\$2,000,000 each occurrence/aggregate
Worker's Compensation	Per Colorado Statutory Requirements

The Owner shall be named as an additional insured on the general liability and umbrella policies. The Commercial General Liability policy shall include coverage for premises, operations, personal injury, advertising injury and contractually assumed liability.

SEH D|B and/or its engineering sub-consultant shall also secure and maintain a professional liability insurance policy. Said policy shall insure payment of damages for legal liability arising out of the performance of professional engineering services for the Project in its capacity as engineer, if such legal liability is caused by a negligent act, error or omission of the insured or any person or organization for which the insured is legally liable. Said policy shall provide minimum limits of \$1,000,000 with a deductible maximum of \$20,000 unless the Owner agrees to a higher deductible.

Before commencing work, SEH D|B shall provide the Owner a certificate of insurance evidencing the required insurance coverage in a form acceptable to Owner. The certificate shall provide that such insurance cannot be cancelled until thirty (30) days after the Owner has received written notice of the insurer's intention to cancel this insurance. Failure to obtain and maintain at all times during the term of this Agreement, all insurance required by this Agreement, shall be a material breach of this Agreement.

## 10. INDEPENDENT CONTRACTOR

The Owner hereby retains SEH D|B as an independent contractor upon the terms and conditions set forth in this Agreement. SEH D|B is not an employee of the Owner and is free to contract with other qualified Affiliates as provided herein. SEH D|B shall be responsible for selecting the means and methods of performing the work. SEH D|B shall furnish any and all supplies, equipment, and incidentals necessary for SEH D|B's performance under this Agreement. Owner and SEH D|B agree that SEH D|B shall not at any time or in any manner represent that SEH D|B or any of SEH D|B's agents, Affiliates or employees are in any manner agents or employees of the Owner. SEH D|B shall be exclusively responsible under this Agreement for SEH D|B's own FICA payments, workers compensation payments, unemployment compensation payments, withholding amounts, and/or self-employment taxes if and to the full extent that any such payments, amounts, or taxes are required to be paid by law or regulation.

SEH D|B agrees to exercise reasonable care to comply with all federal, state, and local laws and ordinances applicable to the Project and the services being performed under this Agreement, including all OSHA and other applicable safety standards. SEH D|B shall be solely and completely responsible for conditions of the Project job site(s) required to complete the Work, including the safety of all persons and property during the performance of the Work and other services. SEH D|B represents and warrants that it and each of its qualified Affiliates has the requisite training, skills, and experience necessary to provide the services and is appropriately licensed by all applicable agencies and governmental entities to provide such services in Colorado.

## 11. CHANGE ORDERS

- 11.1 The Owner may request that SEH D|B perform additional services not originally included in the basic services identified in Exhibit A. Other than as set forth in paragraph 11.2, no such work may be done until after the Owner has approved the change order in writing. Upon such a request by Owner, SEH D|B will generate a Change Order in writing describing the additionally requested Work and the time and price for undertaking that Work.
- 11.2 In any emergency affecting the safety of persons or property, SEH D|B shall act promptly with prudence and reasonable discretion, to prevent threatened damage, injury or loss to person or property. If the emergency was not the result of SEH D|B's activity for the Project, SEH D|B will be entitled to an equitable contract adjustment to compensate SEH D|B for any necessary emergency response services, pursuant to a written Change Order executed subsequent to the necessary response.
- 11.3 All Change Orders shall include:
  - 11.3.1 A detailed description of the Change Order Work proposed to be performed and by whom.
  - 11.3.2 The amount of any price adjustment (up or down) for the Work done pursuant to Change Order.
  - 11.3.3 A modification of the Project schedule, if and to the extent necessitated by the Change Order Work.
  - 11.3.4 Such other commercially reasonable details as the Parties may reasonably require.
- 11.4 SEH D|B may request a change order if it determines that work outside the scope of services in Exhibit A has been directed by Owner or is requested or recommended by SEH D|B's professional sub-consultants..

## 12. TERM AND TERMINATION

- 12.1 Either party may terminate this Agreement prior to the expiration of the 10-year term for material breach of this Agreement, provided such breach is not cured as set forth below.
- 12.2 If either party believes that the other has materially breached the agreement, then the party alleging the breach shall give the other 15 calendar days written notice setting forth the nature of the claimed breach and confirming the intent to terminate. The party claimed to be in breach will then have 15 calendar days to cure the condition which constitutes the alleged material breach of the contract, or demonstrate that no breach exists. If the party in breach fails to correct the breach or fails to demonstrate that no breach exists, the agreement will terminate forty five (45) calendar days after the first written notice.

- 12.3 The Owner may, at any time, terminate this Agreement for the Owner's convenience without cause upon thirty (30) calendar days written notice. In the event the Owner terminates this Agreement for convenience, SEH D|B shall:
- 12.3.1 Cease operations as directed by the Owner in its notice;
  - 12.3.2 Take such actions as are reasonably necessary or as the Owner may direct for the protection and preservation of the Work; and
  - 12.3.3 Except for work directed to be performed prior to the effective date of the termination for convenience, terminate all existing subcontracts and purchase orders, and enter into no further subcontracts or purchase orders.
  - 12.3.4 Determine the total amount due for Work performed and completed prior to the effective date of the termination for convenience.
  - 12.3.5 Provide to the Owner all applicable warranties, if any, for the completed Work of the Project.
- 12.4 In the event of termination for convenience by the Owner, SEH D|B shall be entitled to receive payment for all Work satisfactorily performed through the date of termination, including any Change Orders.
- 12.5 In the event of termination for cause prior to the expiration of the term of this Agreement or any Work Order, Owner shall pay to SEH D|B the remaining amount due for the Work satisfactorily performed within 30 days of termination.

### **13. ASSIGNMENT**

Neither party shall assign this Agreement, nor any interest arising herein, nor any claims arising from or related to this Agreement or the Project, nor delegate any duties or obligations hereunder, without the written consent of the other party, which consent shall not be unreasonably withheld, conditioned or delayed. Any assignment or delegation in violation of this provision shall be null and void.

### **14. WAIVER**

Any waiver by either party of a breach of any provisions of this Agreement shall not affect, in any respect, the validity of the remainder of this Agreement.

### **15. ENTIRE AGREEMENT**

The entire agreement of the parties is contained herein. This Agreement supersedes all oral agreements and negotiations between the parties relating to the subject matter hereof as well as any previous agreements presently in effect between the parties relating to the subject matter hereof. Any alterations, amendments, deletions, or waivers of the provisions of this Agreement shall be valid only when expressed in writing and duly signed by the parties, unless otherwise provided herein.

### **16. COPYRIGHT**

SEH D|B shall defend actions or claims charging infringement of any copyright or patent by reason of the use or adoption of any designs, drawings or specifications supplied by it for the Project, and it shall hold harmless the Owner from loss or damage resulting there from for use of these documents for the Project. Owner shall not use any designs, drawings or specifications supplied by SEH D|B for any other project without the express written consent of SEH D|B.

### **17. RECORDS**

SEH D|B shall maintain complete and accurate records of time and expense involved in the performance of services. SEH D|B agrees to maintain all data regarding the services, the Work and the Project pursuant to the Minnesota Government Data Practices Act, Minnesota Statute Chapter 13 and similar Colorado laws including but not limited to the Colorado Open Records Act.

## 18. BINDING EFFECT, THIRD PARTIES

Each of the provisions of the Contract Documents shall extend to and shall, as the case may require, bind or inure to the benefit not only of the parties, but also for their respective Affiliates, successors, heirs or assigns, provided this clause shall not permit any assignment by any party of the Contract Documents not otherwise permitted. The parties agree that the Contract Documents are not intended by either party to give any benefits, rights, privileges, actions or remedies to any person, partnership, firm or corporation (other than a party or its permitted assignee, or, to the extent applicable, any Affiliates) as a third party beneficiary or otherwise under any theory of law.

## 19. MISCELLANEOUS

- 20.1 This Agreement states the integrated and complete Agreement between Owner and SEH D|B on this subject and replaces any previous understandings, representations or communications, whether oral or written. This Agreement shall be governed, construed and interpreted under Colorado law exclusively.
- 20.2 A party's failure to exercise a right in one or many instances does not waive that right as to any later instance. The course of conduct does not affect a modification or a waiver unless ratified in writing by the party to be bound.
- 20.3 In the event of any litigation between the parties related to this Agreement or its breach, each party will be responsible for recover from the other party its attorney's fees together with expert's fees and other costs.
- 20.4 The section headings of this Agreement are included for purposes of convenience only and will not affect the construction or interpretation of any provision.
- 20.5 All provisions of this Agreement allocating responsibility between the Owner and SEH D|B will survive the completion of the Work or termination of this Agreement.
- 20.6 Any provision or part of this Agreement adjudicated to be void or unenforceable under any law will be deemed deleted, such deletion to apply only with respect to the jurisdiction in which such adjudication is made, and all remaining provisions will continue to be valid and binding upon the parties. The parties agree that this Agreement will be reformed to replace the deleted provision or part thereof with a valid and enforceable provision that comes as close as possible to expressing the intention of the deleted provision.
- 20.7 SEH D|B warrants to Owner that all Work under this Agreement shall be in accordance with the Contract Documents and will not be defective. SEH D|B shall provide a written manufacturer's warranty on paint of at least ten years in a form acceptable to the Owner.
- 20.8 In the hiring of employees or subcontractors to perform work under this Agreement, SEH D|B shall not discriminate against any person by reason of any characteristic protected by state or federal law, and shall strictly comply with all applicable federal, state and local laws prohibiting employment of or contracting with undocumented workers or illegal aliens, including executing a Memorandum of Understanding with the Social Security Administration and Department of Homeland Security (E-Verify Program) or otherwise complying with the published requirements of the City of Brighton Procurement Department.
- 20.9 All notices and other communications under this Agreement must be in writing and must be addressed as follows:

Notice to Owner:                      Water Activity Enterprise of Brighton, Colorado  
Attn: Utilities Director  
City of Brighton  
500 South 4<sup>th</sup> Avenue  
Brighton, CO 80601

Notice to SEH D|B

SEH Design|Build, Inc.  
Attn: Steven L. Peterson  
SEH D|B President  
3535 Vadnais Center Drive  
St. Paul, MN 55110

**IN WITNESS WHEREOF**, the parties hereto through their respective authorized representatives have executed this Agreement as of the day and year first written above.

**OWNER**

**SEH DESIGN|BUILD, INC.**

BY: \_\_\_\_\_  
Water Activity Enterprise of Brighton, Colorado

BY: \_\_\_\_\_  
Steven L. Peterson, President

BY: \_\_\_\_\_

Its: \_\_\_\_\_

Dated: \_\_\_\_\_

Dated: \_\_\_\_\_