

**AGREEMENT FOR
DEMOLITION & RECONSTRUCTION OF
MDPR SKYWALK BRIDGE
REGIONAL EXCHANGE DISTRICT PROJECT**

THIS AGREEMENT, effective as of the date of attestation thereto by the City Clerk, entered into by and between and among the CITY OF DULUTH, a Minnesota municipal corporation (the "City"), and SMDC MEDICAL CENTER, a Minnesota nonprofit corporation ("SMDC").

WHEREAS, the City, in cooperation with SMDC, secured authorization to implement the Regional Exchange District development, hereinafter defined and referred to as the “RED”, in the portion of the City generally referred to as the City’s Medical District pursuant to the hereinafter-defined “Act”; and

WHEREAS, the RED provides generally for the development of new hospital and related facilities and new parking facilities along with an addition to the hereinafter defined Ramp, which will enhance the provision of medical services in the City and will facilitate and strengthen the City’s position as a regional hub for the provision of medical services in the northcentral region of the country; and

WHEREAS, SMDC itself and through various affiliates is the owner of the property in St. Louis County, Minnesota legally described as Block 25, PORTLAND DIVISION (the “Property”) and of the medical clinic building located thereon (the “Building”); and

WHEREAS, City is the owner of the parking ramp located on the property in St. Louis County, Minnesota legally described as all of Block 26, PORTLAND DIVISION (the “Ramp”) which is currently connected by a City-owned skywalk bridge over 4th Avenue East (the “Skywalk”) to the Building; and

WHEREAS, a portion of the Building needs to be demolished to allow the construction on the Property of the proposed new hospital facility thereon (the “Hospital”) along with other property owned by SMDC; and

WHEREAS, both parties are committed to having the Ramp connected by skywalk to the Hospital building or, in its absence to reconnecting the skywalk to the remainder of the Building; and

WHEREAS, the parties are desirous of allowing the demolition of the Skywalk to proceed so as to facilitate construction of the hospital while insuring that the Ramp will be connected to either the Hospital if built or, in the alternative, to the Building.

NOW, THEREFORE, in consideration of the mutual covenants and conditions hereinafter set forth, the parties hereto hereby agree as follows:

ARTICLE I

Definitions

1.1. The words and phrases set forth in this Article I below shall have the meanings hereinafter ascribed to them:

1.1.1. Act: shall Minnesota Laws 2019, 1st Special Session Chapter 6, Article 10. In addition all words and phrases defined in the Act which are used in this Agreement shall have the meanings ascribed to them in the Act unless otherwise specifically stated herein.

1.1.2. A&E: shall mean the firm or firms contracted for by SMDC under the terms and conditions of this Agreement to provide professional architectural services or professional engineering services or both with regard to the Project.

1.1.3. Building: shall mean the structure located on the Property and as the same may, from time to time, be modified or replaced.

1.1.4. Chief Financial Officer: shall mean the City's Chief Financial Officer or such person or persons designated by him to perform various functions of the Director as hereinafter set forth.

1.1.5. CM: shall mean the firm or firms contracted for by SMDC under the terms and conditions of this Agreement to provide professional construction management services with regard to the Project.

1.1.6. Contractor: shall mean the construction contractor or contractors contracted for by SMDC to construct any element or portion of the Project.

1.1.7. DEED: shall mean the State Department of Employment and Economic Development.

1.1.8. Demolition Project: shall mean that portion of the Project involving demolition of the existing Skywalk, including the construction of pedestrian access from the Ramp to the public sidewalk at the corner of 4th avenue West and First Street with convenient and safe passage from said exit point to the existing elevator and stair tower on east side of the Ramp.

1.1.9. Director: shall mean the City's Director of Planning and Economic Development or such person or persons designated by him to perform various functions of the Director as hereinafter set forth.

Existing Skywalk: shall mean the currently-existing Skywalk over 4th Avenue West connecting the Ramp to the Building.

1.1.10. Grant Agreement: shall mean one or more agreements between the City and the State of Minnesota, either directly or through one or more of its Departments establishing any terms and conditions and obligations required of the City by the State in order for the City to have access to and to be able to expend the State funding provided for in the Act.

1.1.11. Hospital: shall mean the hospital structure to be constructed by SMDC on the property on the east side of 4th Avenue East between Superior Street and 2nd Street.

1.1.12. Plans: shall mean all plans and specifications prepared by the A & E for any elements of the Project at any stage of preparation and specifically including construction plans and specifications and any modifications thereto, all approved as provided for in Article IV below.

1.1.13. Project: shall mean the Demolition Project and the Reconstruction Project.

1.1.4. Property: shall mean that property in St. Louis County, Minnesota legally described as Block 25, PORTLAND DIVISION.

1.1.5. Ramp: shall mean the City-owned automobile parking ramp located on that property in St. Louis County, Minnesota legally described as all of Block 26, PORTLAND DIVISION.

1.1.6. Reconstruction Project: shall mean construction of a City-owned Skywalk between the Ramp and the Hospital, or if the Hospital is not under construction before December 31, 2022, between the Ramp and SMDC's existing clinic facility presently located on the property on the east side of 4th Avenue East between Superior Street and 2nd Street.

1.1.17. Regional Exchange District Development or RED: shall mean the Regional Exchange District development as described in the Act.

1.1.18. Reimbursable Costs: shall mean all costs of the construction of the Project which are eligible for reimbursement from State Funds in accordance with the requirements of the Act, the Grant Agreement and this Agreement.

1.1.19. Skywalk: shall mean an elevated, weather-proof, enclosed, heated, cooled and lighted walking structure connecting the interior circulation of two adjacent buildings including but not limited to a structure bridging a public or private street, alley or other right-of-way.

1.1.20. State: shall mean the State of Minnesota.

1.1.21. State Funds: shall mean all funds to be provided by State for the RED pursuant to the Act.

ARTICLE II

Grant Agreement

2.1 Generally

It is anticipated by the parties that in order for the City to access and expend funds to be provided for the RED pursuant to the Act, the City will be required to enter into the Grant Agreement which will place certain requirements, conditions and limitations on the City and its ability to access said funds for the RED. At the time of the signing of this Agreement, the exact terms, conditions and limitations are not known to either party. City agrees that, in negotiating the terms, conditions and limitations of the Grant Agreement, it will use its best efforts to keep SMDC informed of the nature and character of any of those terms, conditions and limitations that will impact the Project and will use its best efforts to mitigate any negative impacts which said terms, conditions and limitations might have on the design, construction and funding of the Project.

2.2 SMDC Bound

SMDC agrees that to the extent that the Grant Agreement imposes any requirements or obligations on the design or construction of the Project or upon the availability of State Funds to reimburse either the City or SMDC for any portion of the costs of the Project, SMDC shall be bound by the terms, conditions and limitations contained in the Grant Agreement.

2.3 SMDC Cooperation

SMDC hereby commits that it will cooperate fully with City in assisting the City to meet all of its obligations under the Grant Agreement to the extent that it can, including but not limited to providing all information and documentation required by the State under the Grant Agreement in order to demonstrate compliance with the requirements of the Act and access to the State Funds.

ARTICLE III

A & E and CM

3.1 Project A & E

SMDC shall contract for the services of the A & E to provide all design and construction administration services required for the design and construction of the Project, subject to the terms and conditions of this Agreement. SMDC shall have the right to contract for the services of different firms to perform A & E services for the Demolition Project and for the Reconstruction Project provided that the terms and conditions of this Agreement shall apply to both contracts. Any agreement for A & E services shall be solely between SMDC and the selected A & E entity so selected and SMDC shall be solely responsible for paying for the services of said A & E. SMDC agrees that its contract for A & E services shall require that the A & E shall deem the City to be its client along with SMDC and the A & E shall owe the same duties, responsibilities and obligations to City to the same extent that it owes such duties, responsibilities and obligations to SMDC.

3.2 Project CM

SMDC shall contract for the services of the CM to provide all construction management services required for the Project, subject to the terms and conditions of this Agreement. SMDC shall have the right to contract for the services of different firms to perform CM services for the Demolition Project and for the

Reconstruction Project provided that the terms and conditions of this Agreement shall apply to both contracts. Any agreement for CM services shall be solely between SMDC and the selected CM entity so selected and SMDC shall be solely responsible for paying for the services of said CM. SMC agrees that its contract for CM services shall require that the CM shall deem the City to be its client along with SMDC and the CM shall have same fiduciary duties, responsibilities and obligations to City as it has to SMDC.

3.3 Initial A & E and CM

As of the date of the signing of this Agreement, SMDC has selected LHB, Inc. to provide A & E services to the Demolition Project and has selected McGough Construction to provide CM services to the Demolition Project. Subject to the terms and conditions of this Agreement, City hereby agrees to the contracting with LHB, Inc. as A & E and McGough Construction as CM for the Demolition Project.

ARTICLE IV

Plans

4.1 In General

The Plans for the Project shall conform to all applicable laws, codes and design requirements applicable to said improvements. The review and approval of the Plans shall not constitute the Director's certification or guaranty that the Plans comply with terms and conditions of this Article or otherwise represent the City's opinion of the adequacy of the Plans or the improvements shown therein to meet the requirements of the Project or of the RED. Notwithstanding the foregoing, all said Plans shall have been approved in writing by the Director prior to the commencement of the construction, thereof.

4.2 Demolition Project

No later than October 15, 2019, SMDC shall cause the A & E to present plans and specifications for the Demolition Project consisting of working drawings and bidding specifications to the Director for his approval. The Plans for the Demolition Project shall conform to the definition of the Demolition Project contained herein and to all applicable laws, codes and design requirements applicable to said improvements. The review and approval of the Plans shall not constitute the Director's certification or guaranty that the Plans comply with terms and conditions of this Article or otherwise represent the City's opinion of the

adequacy of the Plans or the improvements shown therein to meet the requirements of the Project or of the RED. Notwithstanding the foregoing, the Plans for the Demolition Project shall have been approved in writing by the Director prior to the commencement of the construction thereof.

4.3 Construction Project

No later than Sixty (60) days prior to the commencement of construction of the proposed addition to the Ramp provided for in the Act or the Hospital, whichever is sooner, but in no event later than January 1, 2023, SMDC shall cause the A & E to present plans and specifications for the Reconstruction Project consisting of working drawings and bidding specifications to the Director for his approval. The Plans for the Reconstruction Project shall conform to the definition of the Reconstruction Project contained herein and to all applicable laws, codes and design requirements applicable to said improvements. In addition, the Plans for the Reconstruction Project shall provide for suitable and convenient interface between the Ramp and the Hospital or, in the event that the Hospital is not constructed, with the Building. The review and approval of the Plans shall not constitute the Director's certification or guaranty that the Plans comply with terms and conditions of this Article or otherwise represent the City's opinion of the adequacy of the Plans or the improvements shown therein to meet the requirements of the Project or of the RED. Notwithstanding the foregoing, the Plans for the Reconstruction Project shall have been approved in writing by the Director prior to the commencement of the construction thereof.

4.4. Changes to the Plans

Any changes made to Plans proposed by any party other than the City from the Plans referenced in Sections 4.3 or 4.4 above shall be deemed to be material or substantial and shall be submitted by e-mail to the Director at the e-mail addresses provided for herein for approval by him or her in writing before any construction of the Project is commenced in conformance with the proposed changes. Unless the Director shall so approve any such change, no construction of the Project not conforming to the approved Plans shall be constructed; provided, however, that if Director shall have failed to respond to such request for a change to the Plans within 24 hours of the date and time of the e-mail requesting such change as set forth in the date and time stamp contained in said e-mail, said request shall be deemed to have been approved by the City.

ARTICLE V

Bid Documents & Bidding

5.1 Project Bid as Separate Projects

It is contemplated by the parties that the Project will be bid and constructed as two separate projects, the Demolition Project and the Reconstruction Project, separated in time as necessary to be coordinated with the construction of other elements of the RED project. The Demolition Project will be bid and constructed as soon as practical by SMDC. The Reconstruction Project will be bid and constructed contemporaneously and coordinated with the bidding and construction of the addition to the Ramp as described in the Act or the construction of the Hospital, as is agreed by the Director to be most appropriate from a construction staging standpoint but in no even later than January 1, 2023. The provisions of this Agreement, including but not limited to those contained in Articles V, VI, VII, VIII and IX, shall apply to the all aspects of the Demolition Project and the Reconstruction Project.

5.2 In General

Pursuant to Section 4, Subdivision 4 of the Act, the construction contract for construction of the Project is not required to be competitively bid within the meaning of Minnesota Statutes Section 471.345 or Chapter 41 of the Duluth City Code, 1959, as amended. Nevertheless, it is in the best interests of both the City and SMDC that enough contractors who are competent to construct the Project are given an opportunity to provide competitive bids to insure that both the public and SMDC receive a well-constructed project at the best available price. In addition Section 5 (b) of the Act requires that the Project must proceed and comply with state and local contracting requirements that would otherwise be applicable to the City had the City let the contract for construction of the Project.

5.3 Checklist and Cost Allocation

The A & E in cooperation with the CM shall prepare a request for bids and bid specifications which includes a proposed contract for construction of the Project which conforms to the requirements of “Procurement and Contracting Requirements Checklist” attached hereto and made a part hereof as Exhibit A. If SMDC conforms to the procedures set forth in Exhibit A, the City will agree that

SMDC has complied with the requirements of Minnesota Statutes Section 469.53 (b).

5.3 Permits, Licenses, Etc.

SMDC and its contractors shall be responsible for obtaining all permits, plat approvals, licenses and other approvals required pursuant to applicable local, state and federal laws, ordinances and regulations required for the construction of the Project in accordance with the Plans, including those required to be obtained from the City, and for paying the cost thereof.

5.4 Warranty Requirement

The SMDC agrees to warranty and to cause the Contractor to warranty the Reconstruction Project for a period of one (1) years after acceptance by the Director as provided for in Section 7.1 below. Such warranty shall include, but not be limited to, repairs or corrective action due to improper.

5.5 Bid Process

SMDC agrees that it shall be able to reasonably satisfy the Director that it has provided the opportunity to submit competitive bids to a sufficient number of contractors competent to construct the Project in accordance with the Plans prior to the award of the contract to the Contractor. Provided that SMDC shall have the right to award the contract to a contractor other than the contractor submitting the lowest bid amount upon reasonable demonstration of the need therefore for the benefit of the Project.

5.6 Timing & Community Impacts

It is acknowledged by the parties that the Project is a part of the RAD and, as such, it is important that SMDC should have substantial latitude in the timing of the commencement and completion of the Project. However it is also understood that the construction of the Project will have material impacts on City's Medical District and on the entire City as a whole and therefore the timing of the various elements of the construction of the Project is also critical to the City. Therefore, SMDC agrees that all contracts for construction of all elements of the construction of the Project will include definite and enforceable dates for commencement and completion of construction, subject to extension due to Force Majeure events, and that said commencement and completion dates shall be subject to the approval of the Director prior to the awarding of any such contract. It is further agrees that the

Contractor constructing the Reconstruction Projects shall be required to complete such construction no later than December 31, 2023.

5.7 Pre-condition—Skywalk Maintenance Agreement

Prior to awarding any contract for the Demolition Project, SMDC shall have entered into an agreement with City pursuant to which SMDC will undertake to perform all necessary maintenance work, including structural maintenance work and reconstruction work as necessary, and all operating work that will be necessary to the continued use of the Skywalk to be constructed pursuant to the Reconstruction Project. The form of said agreement shall be subject to approval by the City's City Council.

5.8 Approval of Contractor

Upon receipt of bids for the construction of the Project, SMDC shall present copies of all bids along with SMDC's recommendation of the Contractor to whom the contract for construction of the Project should be awarded to the Director for his review and approval. SMDC shall require the A & E and the CM to provide all information and recommendations pertaining to the award of the bid to the Director. The Director and SMDC shall confer as necessary to reach an agreement as to the award of the bid to the Contractor; provided that the contract for construction of the Project shall not be awarded to any contractor without the written consent of the Director.

ARTICLE VI

Construction

6.1 Contract with Contractor

Upon approval of the Director SMDC shall enter into a construction contract for the construction of the Demolition Project and for the Reconstruction Project, as applicable, with the approved Contractor. Said contracts shall be solely between SMDC and the Contractor and payments due the Contractor under the contract shall be solely the responsibility of SMDC. Provide that nothing herein shall prohibit SMDC from entering into multiple contracts with more than one contractor to construct portions of either or both of the Projects but if SMDC chooses to so contract for the construction of either or both of the Project, the requirements of the Act, the Grant Agreement and this Agreement shall apply equally to all such contracts.

6.2 City as “Owner”

For the purposes of the duties owed by a contractor to an “Owner” of a construction project, SMDC agrees that it will require the Contractors to deem the City to be an “Owner” for those purposes.

6.3 Construction Engineering

All construction of the Project will be inspected on a full time basis by the A & E or the CM or both.

6.4 City Involvement in Construction

The City shall have the right but not the obligation to inspect the construction of any and all elements of the Project and shall have full access, upon the Director’s request, to all reports, test results, written notes and materials and all other information pertain to the construction of the Project and its progress; provided that the fact that the City has these rights shall not create any obligation on the part of the City to exercise these rights and the failure of the City to exercise any such rights shall not result in any liability attaching to the City. Nor shall it constitute a waiver of its right to claim damages or otherwise to seek redress for any violation of any obligation by any other person or entity of their obligations under any contract involved in the design or construction of the Project.

6.5 Contractor to Restore Public Improvements

SMDC agrees that it will require the Contractor to make repairs to public streets that may become damaged due to use of the road for hauling of materials, or due to the contractor’s construction practices. The Contractor shall repair such damage in a manner as so that it is acceptable by the Director. Any pavement repairs shall be completed prior to the issuance of the Certificate of Completion.

6.6 Force Majeure.

Unless otherwise provided in this Agreement, if performance under this Agreement is prevented, restricted or interfered with by reason of any event beyond the reasonable control of the parties, including, but not limited to, fire, flood, epidemic, earthquake, explosion, act of God or public enemy, riot or civil disturbance, strike, labor dispute, war, terrorist threat or activity, any government law, order, or regulation, or order of any court or jurisdiction (a "Force Majeure"), the restricted party will not be in breach hereof and the performance or obligation

of such party will be excused for a period of time equal to the period during which the Force Majeure prevents such performance. In such event, the parties will make reasonable efforts to determine sufficient actions allowing the restricted party to satisfy its obligations hereunder. The financial condition, default, breach, or intentional or negligent act or omission of this Agreement by the party seeking excuse from performance will not constitute a Force Majeure.

ARTICLE VII

Certificate of Completion

7.1 Completion Inspection

Upon completion of construction of the Project, SMDC will give formal notice to the Director thereof via certification by the A & E or the CM that the public improvements have been constructed in complete accordance with this Agreement and the approved plans and specifications. Upon receiving such notice/certification and record drawings as provided for in Article VIII below, the Director will inspect the public improvements. If the public improvements are in conformance with the applicable requirements, the Director will issue a Certificate of Completion certifying that the Project is complete and will direct that the City will assume ownership and operation of the Project. If the public improvements are not in conformance with the applicable requirements, the Director will provide formal notice to the SMDC of the need for repair or replacement in conformance with the requirements of this Agreement.

7.2 Delay in Assumption of Control

Until such time as ownership, operation, and maintenance of the public improvements is formally accepted in writing by the Director, their operation and maintenance will be solely the responsibility of the SMDC

ARTICLE VIII

Record Drawings

8.1 Engineering Documentation

Prior to the issuance the Certificate of Completion referred to in Article VII above, SMDC shall require the A & E to furnish record drawings of the Project prepared in accordance with industry standards for record drawings.

ARTICLE IX

Reimbursement of Reimbursable Costs

9.1 Partial Payment Requests

Subject to the receipt by the City of State Funds, made available pursuant to the Act, to reimburse SMDC for Reimbursable Costs incurred by SMDC in the construction of the Reconstruction Project and no more frequently than monthly, SMDC may submit a request for reimbursement of such Reimbursable Costs to the Chief Financial Officer be in the form of that attached hereto and made a part hereof as Exhibit B approved for payment by the A & E, the CM and the Director and shall be accompanied by such documentation as is necessary to demonstrate compliance with the requirements of the Act, the Grant Agreement and this Agreement and shall also be accompanied by such other documentation as shall be reasonably requested by the Chief Financial Officer.

9.1.1 Partial Payment

Upon receipt of the Request for Partial Payment with supporting documentation approved by the Chief Financial Officer as provided for in Section 9.1 above, and subject to the provisions of that Section, the City will reimburse SMDC for the Reimbursable Costs documented in said Request for Partial Payment. Provided that the City may retain five (5%) Percent of the amount of such partial payment until conditions for Final Payment as provided for in this Article have been met.

9.2 Final Payment Request

Upon issuance of the Certificate of Completion as provided for in Article VII above and the provision of the Engineering Documentation required pursuant Article VIII above, SMDC may request that the City reimburse it for Reimbursable Costs incurred by it in the Construction of the Reconstruction Project. Such request shall be in the form of that attached hereto and made a part hereof as Exhibit B and shall be accompanied by such documentation as is necessary to demonstrate compliance with the requirements of the Act, the Grant Agreement and this Agreement and shall also be accompanied by such other documentation as shall be reasonably requested by the Chief Financial Officer.

9.2.1 Final Reimbursement Payments

Upon receipt of the Request for Final Reimbursement and supporting documentation, all as approved by the Chief Financial Officer, City hereby agrees that it will reimburse SMDC for eligible costs incurred by it in the construction of the Reconstruction Project upon the later for the following dates and occurrences:

9.2.1. The issuance of the Certificate of Completion as provided for in Article VII above.

9.2.1.2. The delivery of the Engineering Documentation required by Article VIII above.

9.2.1.3. The receipt by City of Appropriation Support Payments as defined in and provided for in the Act, up to the maximum amounts set forth therein.

9.3 Maximum Amounts

Notwithstanding anything in foregoing to the contrary, the maximum amounts which the City shall be obligated to pay to SMDC to reimburse if for Reimbursable Costs incurred by it in designing and construction the Reconstruction Project shall be \$2,100,000.

9.4 Payment Source

All payments from City to SMDC shall be payable from Fund 455 Regional Exchange District.

ARTICLE X

Provisions Against Liens, Assignments and Transfers

10.1 Provision Against Liens

Except for encumbrances permitted pursuant to Section 9.2 below, the SMDC shall not create or permit any mortgage, encumbrance or allow any mechanic's or materialmen's liens to be filed or established or to remain against the Project and property upon which it is constructed or any part thereof which would materially or adversely affect the CITY's interest in this Agreement during the term of this Agreement, provided that if SMDC shall first notify CITY of its intention to do so and post such security as CITY reasonably deems necessary, SMDC may, in good faith, contest any such mechanic's or other liens filed or established as long as

CITY does not deem its interest or rights in this Agreement to be subject to foreclosure by reason of such context.

10.2 Provision Against Assignments, Transfers or Change in Identity of SMDC

The parties hereto acknowledge that CITY is relying upon the qualifications and identify of SMDC to develop and construct the Project. Therefore, except for the purposes of obtaining financing as hereinafter described and otherwise approved by this Agreement, SMDC represents and agrees for itself, its successors and assigns that it has not made or created, and will not make or create or suffer to be made or created, any total or partial sale, assignment, conveyance, lease, trust, lien or power of attorney, nor has it nor will it allow any change in the identity of the principals or their respective percentages of ownership or voting rights, if such change would result in a change of control, and has not or will not otherwise transfer in any other way all or any portion of the Project, SMDC, this Agreement or any other contract or agreement entered into in connection with carrying out its obligations hereunder prior to the issuance of the Certificate of Completion described in Article VII above; and except for mortgaging approved in writing by the Chief Financial Officer, SMDC will not make or create or suffer to be made any such transfer of SMDC's rights hereunder without the prior approval of CITY.

ARTICLE XI

Indemnification

11.1 Generally

SMDC will to the fullest extent permitted by law, protect, indemnify and save CITY and the City of Duluth and their officers, agents, servants, employees and any person who controls CITY within the meaning of Securities Act of 1933, harmless from and against all liabilities, losses, damages, costs, expenses, including attorneys' fees and expenses, causes of action, suits, claims demands and judgements of any nature arising from:

11.1.1 Any injury to or death of any person or damage to property in or upon the Project, the Ramp or property upon which it is located or the Property or growing out of or in connection with the use or non-use, condition or occupancy of the Project or any part thereof and the construction or

installation of the Project on any portion of the Property. The foregoing indemnification shall not be limited in any way by any limitation on the amount or type of damage, compensation or benefits payable by or for the SMDC, customers, suppliers or affiliated organizations under any Workers' Compensation Act, Disability Benefit Acts or any other Employee Benefit Acts.

11.1.2 Any violation by SMDC of any provision of this Agreement.

11.1.3 Any violation of any contract, agreement or restriction related to the Project which shall have existed at the commencement of the term of this Agreement or shall have been approved by the SMDC.

11.1.4 Any violation of any law, ordinance, court order or regulation affecting the Project, or the ownership, occupancy or use thereof.

11.2 Environmental Indemnification

In addition to the generality of the foregoing above, SMDC hereby agrees that for itself, its successors and assigns that it will indemnify and save the CITY and the City of Duluth and their officers, agents, servants and employees and any person who controls the CITY or the City within the meaning of the Securities Act of 1933 harmless from and against all liabilities, losses, damages, costs, expenses, including reasonable attorneys' fees and expenses, causes of action, suits, claims, demands and judgments arising out of any condition created in the after the date of the signing of this Agreement which constitutes a violation of any environmental law or laws with regard to pollutants or hazardous or dangerous substances promulgated by the government of the United States or of the State of Minnesota or of any such duly promulgated rules and regulations of the United States Environmental Protection Agency or the Minnesota Pollution Control Agency or the presence in the Project of any element, compound, pollutant, contaminant, or toxic or hazardous substance, material or waste, or any mixture thereof, which otherwise causes injury or death to persons or damage to property and that indemnification granted hereby shall include all costs of clean-up, remediation, together with the costs incurred in proceedings before court of law or administrative agency including attorney's fees, expenses, the fees and

expenses of persons providing technical expertise addressing such problems, including expert witnesses, the costs of preparing and securing approval of Response Action Plans as may be necessary to meet the requirements of the aforesaid agencies and any other costs and expenses of any kind whatsoever arising out of such conditions existing in the Project.

11.3 Exception for Acts or Omissions of City

The indemnification obligations contained in Sections 11.1 and 11.2 above shall not apply to liability arising solely out of the acts or omissions of the City and its officers, agents, servants or employees.

11.4 Indemnification Procedures

Promptly after receipt by City of notice of the commencement of any action with respect to which the other party is required to indemnify the party receiving such notice under this Article, such indemnitee shall notify the indemnitor in writing of the commencement thereof, and, subject to the provisions as hereinafter stated, the indemnitor shall assume the defense of such action, including the employment of counsel satisfactory to the indemnitee and the payment of expenses. In so far as such action shall relate to any alleged liability of the indemnitee with respect to which indemnity may be sought against the indemnitor, the indemnitee shall have the right to employ separate counsel in any such action and to participate in the defense thereof, and the fees and expenses of such separate counsel shall be at the expense of the indemnitor.

ARTICLE XII

Insurance

12.1 Insurance and Coverage

SMDC will provide and maintain or cause to be provided and maintained at all times during the process of constructing the Project an All Risk Broad Form Basis Insurance Policy. The City shall be named as an additional insured at all times on all required insurance and SMDC will furnish the City with proof of payment of premiums on policies covering the following:

12.1.1 Builder's risk or hazard insurance, written on the so-called "Builder's Risk Completed Value Basis," in an amount equal to one hundred percent

(100%) of the insurable value of the Minimum Improvements at the date of completion (excluding footers, foundations and other subsurface improvements and also excluding paved areas, sidewalks, curbs, aprons, mass grading and other site work), and with coverage available in non-reporting form on the so called "all risk" form of policy. The interest of the City shall be protected in accordance with a clause in form and content satisfactory to the City;

12.1.2 Commercial general liability insurance (including operations, contingent liability, operations of subcontractors, completed operations, Broadening Endorsement including contractual liability insurance) together with an Owner's Contractor's Policy with limits against bodily injury and property damage of not less than \$5,000,000.00 for each occurrence and shall be endorsed to show the City as an additional insured (to accomplish the above-required limits, an umbrella excess liability policy may be used).

12.1.3 The A & E and the CM shall be required to provide Professional Liability Insurance in an amount not less than \$1,500,000 Single Limit; provided further that in the event the professional malpractice insurance is in the form of "claims made" insurance, 60 days' notice prior to any cancellation or modification shall be required; and in such event, Service Provider agrees to provide City with either evidence of new insurance coverage conforming to the provisions of this paragraph which will provide unbroken protection to City, or, in the alternative, to purchase at its cost, extended coverage under the old policy for the period the statute of repose runs; the protection to be provided by said "claims made" insurance shall remain in place until the running of the statute of repose for claims related to this Agreement.

12.1.4 Worker's compensation insurance, with statutory coverage and employer's liability protection.

12.2 Requirements of All Insurance

All insurance required under this Article shall be taken out and maintained in responsible insurance companies selected by SMDC which are authorized under the laws of the State to assume the risk covered thereby. Upon request, SMDC will deposit annually with the City a certificate or certificates of the respective insurers stating that such insurance is in force and effect. SMDC shall give written notice to the City at least thirty (30) days before the effective date of any cancellation or modification which reduces the coverage provided below

the amounts required herein. In lieu of separate policies, SMDC may maintain a single policy, blanket or umbrella policies, or a combination thereof, having the coverage required herein, in which event SMDC shall deposit with the City a certificate or certificates of the respective insurers as to the amount of coverage in force upon the Minimum Improvements.

12.3 Self-Insurance

Alternatively, and in lieu of the forgoing subsections (a) and (b), SMDC shall annually provide reasonable proof of equivalent self-insurance to the City.

12.4 Damage to Project

SMDC agrees to notify the City with reasonable promptness in the case of damage exceeding \$1,000 in amount to, or destruction of, the Project or any portion thereof resulting from fire or other casualty that occurs prior to completion of the Project. In the event of any such damage or destruction, SMDC will, within a reasonable time and with due diligence repair, reconstruct and restore, or cause the repair, reconstruct or restoration of the Project to substantially the same or an improved condition or value as existed prior to the event causing such damage.

ARTICLE XIII

Default

13.1 Events of Default Defined.

The following shall be "Events of Default" under this Agreement and the term "Event of Default" shall mean whenever it is used in this Agreement any one or more of the following events that remains uncured by such party beyond any applicable notice, cure and/or graced period set forth in Section 13.2 below or elsewhere herein:

13.1.1 Failure by SMDC to complete construction of the Project in accordance with the approved Plans in conformance with the terms and conditions of this Agreement by December 31, 2022, subject to extension due to Force Majeure events, or changes as approved by the City as set forth in this Agreement.

13.1.2. Failure by SMDC to complete construction of the Hospital consisting of an approximately \$675 Million state-of-the-art hospital and

medical facility on property generally located between 4th and 5th Avenues East and Superior Street and Second Street in Duluth, Minnesota by December 31, 2022, subject to extension due to Force Majeure events.

13.1.3 Failure by SMDC, as the case may be, to pay timely any ad valorem real property taxes or special assessments (to the extent any are applicable and properly payable by SMDC as under Article 5.1 hereunder) assessed with respect to the Property.

13.1.4 Failure by SMDC to cause the construction of the Minimum Improvements to be completed pursuant to the terms, conditions and limitations of this Agreement.

13.1.5 The holder of any mortgage on the Property or any improvements thereon, or any portion thereof, commences foreclosure proceedings as a result of any default under the applicable mortgage documents.

13.1.6 Failure by SMDC to substantially observe or perform any other material covenant, condition, obligation or agreement on its part to be observed or performed under this Agreement.

13.1.7 If SMDC shall:

13.1.7.1 file any petition in bankruptcy or for any reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under the United States Bankruptcy Act of 1978, as amended or under any similar federal or state law, or

13.1.7.2 Make an assignment for the benefit of its creditors; or

13.1.7.3 Admit in writing its inability to pay its debts generally as they become due; or

13.1.7.4 be adjudicated a bankrupt or insolvent; or if a petition or answer proposing the adjudication of SMDC, as a bankrupt or its reorganization under any present or future federal bankruptcy act or any similar federal or state law shall be filed in any court and such petition or answer shall not be discharged or denied within ninety (90) days after the filing thereof; or a receiver, trustee or liquidator of SMDC, or of the Project, or part thereof,

shall be appointed in any proceeding brought against SMDC, and shall not be discharged within ninety (90) days after such appointment, or if SMDC, shall consent to or acquiesce in such appointment.

13.1.8 Any representation or warranty made by SMDC under this Agreement shall prove to have been incorrect in any material respect when made.

13.1.9 Failure by the City to substantially observe or perform any covenant, condition, obligation or agreement on its part to be observed or performed under this Agreement.

13.1.10 Any representation or warranty made by the City under this Agreement shall prove to have been incorrect in any material respect when made.

13.2 Remedies on Default.

Whenever any Event of Default referred to in Section 13.1 occurs and is continuing, the non-defaulting party, as specified below, may take any one or more of the following actions after providing thirty (30) days' written notice to the defaulting party (and any other party to this Agreement), but only if the Event of Default has not been cured within said thirty (30) days, or if said Event of Default cannot reasonably be cured within the time, the defaulting party fails to give assurances reasonably satisfactory to the non-defaulting party that the Event of Default will be cured within a period of time reasonably acceptable to the non-defaulting party, but in any event not to exceed ninety (90) days.

13.2.1 If an Event of Default is caused by SMDC, the City may suspend its performance under this Agreement until it receives assurances from SMDC, deemed adequate by the City, that SMDC will cure the default and continue its performance under this Agreement.

13.2.2 If an Event of Default is caused by SMDC, the City may terminate this Agreement, except that no termination may be effective at any time that SMDC is proceeding in good faith to cure the defect and/or gives reasonable assurances to the City as required in (a) above, or if there

exists a good faith dispute with the City as to an event of default as defined above, and SMDC posts a bond or other security as reasonably adequate to cure the alleged default.

13.2.3 If an Event, of Default is caused by SMDC the City may take any action, including legal or administrative action, which may appear necessary or desirable to enforce performance and observance of any obligation, agreement, or covenant of SMDC under this Agreement.

13.2.4. If an Event of Default as defined in Section 13.1.1. is caused by SMDC, City shall have the right to cause to be designed and constructed a Skywalk bridge connecting the Ramp to the remaining portion of the Building or its replacement at a location best serving the needs of the public but not unreasonably disruptive to the operation of the Building, the cost of which shall be the responsibility of SMDC and, within Sixty (60) days of being billed therefore, SMDC shall reimburse City for said costs.

13.2.5 If an Event of Default is caused by the City, SMDC may seek specific performance of the City's obligations hereunder and pursuant to the Note and may exercise any and all other rights and remedies that it may be entitled under the Note, any other provision of this Agreement, or applicable laws or in equity.

13.3 No Remedy Exclusive. No remedy herein conferred upon or reserved to the City or SMDC is intended to be exclusive of any other available remedy or remedies, but each and every such remedy shall be cumulative and shall be in addition to every other remedy given under this Agreement or now or hereafter existing at law or in equity or by, statute. No delay or omission to exercise any right or power accruing upon any default shall impair any such right or power or shall be construed to be a waiver thereof, but any such right and power may be exercised from time to time and as often as may be deemed expedient.

13.4 No Implied Waiver. In the event any agreement contained in this Agreement should be breached by any party and thereafter waived by any other party, such waiver shall be limited to the particular breach so waived and shall not be deemed to waive any other concurrent, previous or subsequent breach hereunder.

ARTICLE XIV

Additional Provisions

14.1 Titles of Articles and Sections.

Any titles of the several parts, Articles, and Sections of the Agreement are inserted for convenience of reference only and shall be disregarded in construing or interpreting any of its provisions.

14.2 Disclaimer of Relationships.

SMDC acknowledges that nothing contained in this Agreement nor any act by the City or SMDC shall be deemed or construed by SMDC or by any third person to create any relationship of third-party beneficiary, principal and agent, limited or general partner, or joint venture between the City, SMDC and/or any third party.

14.3 Modifications.

This Agreement may be modified solely through written amendments hereto executed by both SMDC and the City.

14.4 Counterparts.

This Agreement is executed in any number of counterparts, each of which shall constitute one and the same instrument.

14.5 Judicial Interpretation.

Should any provision of this Agreement require judicial interpretation, the court interpreting or construing the same shall not apply a presumption that the terms hereof shall be more strictly construed against one party by reason of the rule of construction that a document is to be construed more strictly against the party who itself or through its agent or attorney prepared the same, it being agreed that the agents and attorneys of both parties have participated in the preparation hereof.

14.6 Termination of Agreement.

Unless terminated earlier pursuant to specific provision of this Agreement, this Agreement and the obligations SMDC and the City shall terminate upon the completion thereof; provided, however, that any claims or causes of actions the basis for which arose prior to said time shall survive such termination and nothing herein

shall be deemed as intended to limit the exercise by either party of its remedies in connection therewith except any relevant statute of limitations

14.7 Conflicts of Interest.

No member of the governing body or other official of the City shall participate in any decision relating to the Agreement, which affects his or her personal interests or the interests of any corporation, partnership, or association in which he or she is directly or indirectly interested. No member, official or employee of the City shall be personally liable to the City in the event of any default or breach by SMDC or their successors or on any obligations under the terms of this Agreement

14.8 Notices and Demands.

Except as otherwise expressly provided in this Agreement, a notice, demand or other communication under this Agreement by any party to any other shall be sufficiently given or delivered if it is dispatched by

14.8.1 In the case of SMDC is addressed to or delivered personally to SMDC at:

St. Mary's Duluth Clinic Health System, DBA Essentia Health East502
East Second Street
Duluth, MN 55805
Attention: Office of the General Counsel

14.8.2 In the case of the City is addressed to or delivered personally to the City at:

City of Duluth
411 West First Street
Room 120 City Hall
Duluth, MN 55802
Attn: Chief Financial Officer

or at such other address with respect to any such party as that, party may, from time to time, designate in writing and forward to the other, as provided in this Section.

ARTICLE XV

Governing Law

15.1 Law Governing. This Agreement will be governed and construed in accordance with the laws of the State of Minnesota.

IN WITNESS WHEREOF, the City and SMDC have caused this Agreement to be duly executed on or as of the date first above written.

CITY OF DULUTH, a Minnesota
municipal corporation

SMDC MEDICAL CENER, a Minnesota
nonprofit corporation

By: _____

Emily Larson
Its Mayor

By: _____

Its: _____

Attest:

By: _____

Chelsea Helmer
Its City Clerk

Date: _____

Approved:

Assistant City Attorney

Countersigned:

City Auditor