

ATTACHMENT 1

INTERMODAL CONTAINER TERMINAL EXPANSION PROJECT AGREEMENT

Duluth Seaway Port Authority &
City of Duluth

THIS AGREEMENT, effective as of the date of attestation thereto by the City Clerk, by and between CITY OF DULUTH, a municipal corporation (hereinafter referred to as “City”), and the DULUTH SEAWAY PORT AUTHORITY (herein referred to as “Authority”) a body corporate and politic, existing under the laws of the State of Minnesota, having its principal office in Duluth, Minnesota.

WHEREAS, Authority is the owner of the Clure Public Marine Terminal (the “Terminal”) located in the City of Duluth on St. Louis Bay; and

WHEREAS, Authority desires to have constructed at the Terminal an expansion project as described in the “Duluth Seaway Port Authority Grant Application – Minnesota Department of Transportation (MnDOT) MINNESOTA HIGHWAY FREIGHT PROGRAM—INTERMODAL PROGRAM” dated August 18, 2017, a copy of which is attached hereto as Exhibit A (the “Project”) at a cost for design and construction engineering of \$283,572 and a total estimated Project construction cost of \$2,370,281.03, all as further described on Exhibit B attached hereto, and applied for a grant of Federal funds from and through the Minnesota Department of Transportation (“MnDOT”) in the amount of \$1,896,224.82; and

WHEREAS, the Project was awarded a grant by MnDOT in said amount (the “Grant”), subject to the commitment of Authority to fund the remaining \$474,056.21, which commitment Authority has made; and

WHEREAS, based on MnDOT funding requirements, the Grant must be directed to an entity which is entitled to receive transportation-related State Aid funds; and

WHEREAS, Authority is not an entity entitled to receive transportation-related State Aid funds but City is so entitled; and

WHEREAS, Authority has requested that City act as grant recipient, as it’s administrator to bid, award and contract for the construction of the Project (the

“Contract”) and to agree to administer the fiscal portion of the Grant and the Contract; and

WHEREAS, City is willing to perform the above services and functions subject to the following terms and conditions.

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

1. City as Funding Administrator

Authority hereby requests that City act as its designated recipient of Grant funding, as its fiscal contract administrator and as its paying agent under the Contract and to provide any other and related services as hereinafter set forth in the Agreement as all such services are related to the Project and City hereby agrees to perform said Project services, all subject to the terms and conditions hereinafter set forth. All such services shall be performed in accordance with the requirements of MnDOT and the Federal Highway Administration (“FHWA”) for State Aid and Federal Aid projects respectively.

2. Authority Responsibilities

Authority shall have the following responsibilities during the course of the Project:

A. Contract with the firm of SEH, Inc. to perform all services needed to design the Project up to and including preparing final construction plans and specifications suitable for, and to serve as the basis for, the bidding of the Project. Authority shall have complete control of the design of the Project as between the parties hereto except that City may require such modifications to the form of the plans and specifications as it deems necessary or appropriate to allow City to bid out the Project. All costs of such services shall be paid directly by the Authority and shall not be included in amounts to be paid by City as hereinafter provided for.

B. Review and approve of all City bid documents prior to City advertising for bids for the construction of the Project.

C. Review and approve of the award of bid to the contractor determined by City to be the lowest responsible bidder for the Contract (the “Contractor”).

D. Contract for the services of a licensed and qualified professional engineering firm (the “Engineer”) familiar with MnDOT State and Federal Aid processes to provide construction engineering, inspection, materials testing, surveying and staking for the construction of the Project and to perform all services necessary to close out documents necessary on a Federal Aid project with regard to the Project. All costs of such services shall be paid directly by the Authority and shall not be included in amounts to be paid by City as hereinafter provided for.

E. Supervise, control and give direction to the Engineer as the Authority deems appropriate in the performance of their work with regard to the Project.

F. Review and approve as deemed necessary by Authority any change orders to the Contract, subject to the Authority’s commitment to pay in their entirety any additional costs of the Project arising by reason of the approval of any such change orders.

G. Approve the invoices for materials testing from MnDOT for the Project in accordance with its Materials Independent Assurance Sampling and Testing protocols (the “Invoices”).

H Receive, review, verify as appropriate and approve all requests for partial payment and the request for final payment from the Contractor for work done under the Contract and for the Invoices from MnDOT for materials testing as described in Subparagraph G. above, all as approved by the Engineer, within five (5) days of the receipt thereof, subject to the right and responsibility of the Authority to request any correction or clarification of any element of such request as the Authority deems appropriate.

I. Upon approval of any request for partial payment or for final payment as referenced above, to promptly forward the same to City along with sufficient funds to fully fund the City’s payment to the Contractor in accordance with such approved request plus an amount equal to the City Cost Reimbursement Payment as described in Paragraph 4, below.

J. Upon approval of any Invoice as referenced above, to promptly forward the same to City along with sufficient funds to fully fund the City’s payment to MnDOT in accordance with such approved request plus an

amount equal to the City Cost Reimbursement Payment as described in Paragraph 4, below.

3. City Responsibilities

City shall have the following responsibilities during the course of the Project:

A. Upon receipt of the plans and specifications for the Project as described in Paragraph 2. A. above, City shall prepare, in accordance with standard City bidding procedures and with MnDOT's Delegated Contract Projects (DCP) construction administration procedures, all bid documents necessary for bidding out the Project and present said documents to Authority for its approval.

B. Upon approval by Authority of the above bid documents, bid out the construction of the Project, receive and evaluate the bids and present the bids and its recommendations as to selection of the lowest responsible bidder to Authority for its approval.

C. Upon approval of the Authority of the lowest responsible bidder, award the Contract to the lowest responsible bidder (the Contractor) and enter into the Contract with the Contractor for construction of the Project.

D. Execute any change orders approved by Authority in accordance with Paragraph 2. F. above.

E. Upon receipt of any request for partial payment or final payment and funds as provided for in Paragraph 2.I. above, pay Contractor the approved amount of said request for partial payment or final payment.

F. Upon receipt of any Invoice and funds as provided for in Paragraph 2.J. above, pay MnDOT the approved amount of said request for partial payment or final payment.

G. Upon making any payment as provided for in Subparagraphs E. and F. above, submit a request for reimbursement of the portion of such payment amounts which is eligible for reimbursement from Grant funds along with the amounts of the City Cost Reimbursement Payment received in conjunction therewith which is eligible for reimbursement from Grant funds to MnDOT together with such supporting documentation as MnDOT shall require in order to receive such reimbursement.

H. Upon receipt of any reimbursement from MnDOT pursuant to any request made pursuant to Subparagraph G. above, remit the amount received from MnDOT to Authority.

4. City Cost Reimbursement Payment

In order to reimburse City for its costs of providing fiscal administrative services to Authority for the Project, City shall be entitled to, and Authority agrees to pay City an amount equal to Three (3%) Percent of the total cost of the Project. Said sums shall be payable in conjunction with the receipt of partial and final payment requests and Invoices as provided for in Subparagraph I. and J. of Paragraph 2 above and said sums shall be deposited in the Permanent Improvement Fund Capital Projects Account Fund 411-035.

5. Term

The Term of this Agreement shall run from the Effective Date hereof through December 31, 2019 or until all of the parties' obligations hereunder have been fulfilled, whichever is later.

6. Default and Remedies

In the event that either party shall fail to perform any obligation of said party owed to the other party hereunder, the non-defaulting party may give notice in writing to the defaulting party setting forth the obligation or obligations which the defaulting party shall have failed to perform in conformance with the requirements of this Agreement and upon receipt thereof the defaulting party shall immediately commence to cure any such default or, if cure cannot be reasonably commenced immediately, shall commence such cure as soon as reasonably practical and shall complete such cure as soon as is reasonably practical. If cure of such default shall not be so commenced and completed, the non-defaulting party shall be entitled to seek damages for any damages resulting from such failure to cure, injunctive relief to compel performance of any obligation under the Agreement with regard to which the defaulting party is in default or both.

7. Independent Contractor

a. It is agreed that nothing herein contained is intended or should be construed in any manner as creating or establishing the relationship of copartners between the parties hereto or as constituting Authority as an

agent, representative or employee of the City for any purpose or in any manner whatsoever. The parties do not intend to create any third party beneficiary of this Agreement. Authority and its employees shall not be considered employees of the City, and any and all claims that may or might arise under the Worker's Compensation Act of the State of Minnesota on behalf of Authority's employees while so engaged, and any and all claims whatsoever on behalf of Authority's employees arising out of employment shall in no way be the responsibility of City. Authority's employees shall not be entitled to any compensation or rights or benefits of any kind whatsoever from City, including without limitation, tenure rights, medical and hospital care, sick and vacation leave, Worker's Compensation, Unemployment Insurance, disability or severance pay and P.E.R.A. Further, City shall in no way be responsible to defend, indemnify or save harmless Authority from liability or judgments arising out of Authority's intentional or negligent acts or omissions of Authority or its employees while performing the work specified by this Agreement.

b. The parties do not intend by this Agreement to create a joint venture or joint enterprise, and expressly waive any right to claim such status in any dispute arising out of this Agreement.

8. Force Majeure

Under the terms of this Agreement, neither the City nor Authority shall be considered in default or in breach of any of the terms with respect to the performance to their respective obligations under this Agreement in the event of enforced delay in the performance of its obligations due to unforeseeable causes beyond its control and without its fault or negligence, including but not limited to acts of God, acts of a public enemy, acts of the federal government, acts of another party, fire, floods, epidemics, strikes or embargoes, or for delays of subcontractors due to such causes. In the event of any such delay, any time for completion or delivery under this Agreement shall be extended for the period of any such delay upon written notice from the party seeking the extension to the other party.

9. Notices

Notices hereunder shall be deemed given if mailed by certified mail, return receipt requested, postage prepaid and addressed as follows:

If to the Authority: Executive Director
Duluth Seaway Port
Authority 1200 Port
Terminal Drive Duluth,
MN 55803

If to City: Director of Public Works &
City of Duluth
411 W. 1st St.
Room 211B
Duluth, MN 55802

Or at such other address or in such other manner as the parties shall from time to time designate to the other by notice given as herein provided. Notice by mail shall be effective three (3) days after mailing. In the event of an emergency the Authority may give oral notice which shall be effective immediately.

10. Civil Rights Assurances

Authority, as part of the consideration under this Agreement, does hereby covenant and agree that:

a. No person on the grounds of race, color, creed, religion, national origin, ancestry, age, sex, marital status, status with respect to public assistance, sexual orientation, and/or disability shall be excluded from any participation in, denied any benefits of, or otherwise subjected to discrimination with regard to the work to be done pursuant to this Agreement.

b. That all activities to be conducted pursuant to this Agreement shall be conducted in accordance with the Minnesota Human Rights Act of 1974, as amended (Chapter 363), Title 7 of the U.S. Code, and any regulations and executive orders which may be affected with regard thereto.

11. Laws, Rules and Regulations

Authority agrees to observe and comply with all laws, ordinances, rules and regulations of the United States of America, the State of Minnesota and the City with respect to their respective agencies which are applicable to its activities under this Agreement.

12. Applicable Law

This Agreement, together with all of its paragraphs, terms and provisions is made in the State of Minnesota and shall be construed and interpreted in accordance with the laws of the State of Minnesota.

13. Severability

In the event any provision herein shall be deemed invalid or unenforceable, the remaining provision shall continue in full force and effect and shall be binding upon the parties to this Agreement.

14. Entire Agreement

It is understood and agreed that the entire agreement of the parties including all exhibits is contained herein and that this Agreement supersedes all oral agreements and negotiations between the parties relating to the subject matter hereof. Any amendment to this Agreement shall be in writing and shall be executed by the same parties who executed the original agreement or their successors in office.

15. Counterparts

This Agreement may be executed in two or more counterparts, each of which shall be deemed to be an original as against any party whose signature appears thereon, but all of which together shall constitute but one and the same instrument. Signatures to this Agreement transmitted by facsimile, by electronic mail in “portable document format” (“.pdf”), or by any other electronic means

which preserves the original graphic and pictorial appearance of the Agreement, shall have the same effect as physical delivery of the paper document bearing the original signature.

IN WITNESS WHEREOF, the parties have set their hands as of the effective date hereof.

CITY OF DULUTH

DULUTH SEAWAY PORT
AUTHORITY

By _____
Its Mayor

By _____
Its Executive Director

By: _____
Its City Clerk

Dated: _____, 2018

Countersigned:

City Auditor

Approved as to form:

Assistant City Attorney

