

EXHIBIT A

Prepared by the
Utility Agreements and Permits Unit
(Payable)
(\$523,169.00)
(Actual Cost)

S.P. 6982-322 (T.H. 35)
Location: I-35, I-535 & US 53 in the City of
Duluth
Utility Owner: City of Duluth
MnDOT Agreement Number 1032661

PRELIMINARY AGREEMENT

This Agreement Number 1032661 (Agreement) is between the State of Minnesota (State), acting through its Commissioner of Transportation, and City of Duluth, including its agents, contractors, and subcontractors (Utility Owner). This Agreement describes how the parties will mitigate the effects of a State construction project on the Utility Owner.

RECITALS

The State plans to let a contract to construct State Project Number 6982-322 (Project) on Trunk Highway Number 35. The Project is located along I-35, I-535 & US 53 in the City of Duluth.

The Utility Owner owns and operates sanitary sewers, water mains and gas mains, their fixtures, and related equipment (Facilities) that are located on property where the State will construct the Project. The State has determined that the Project will require the Utility Owner to relocate these Facilities. In order to relocate its Facilities, the Utility Owner must complete preliminary engineering before the State begins construction. Preliminary engineering includes staking location surveys and preparing plans, specifications, and estimates. The Utility Owner has requested reimbursement for this work.

The Federal Highway Administration (FHWA), acting in cooperation with the State, will make federal funds available for the acquisition of replacement right of way and for preliminary engineering. Code of Federal Regulations, title 23, part 645, subpart A, and as amended describes the extent to which the FHWA can use federal funds to reimburse the Utility Owner for the cost of its relocation work.

Code of Federal Regulations, title 23, part 645, subpart A, and as amended requires a written agreement that specifies the work the Utility Owner will perform for reimbursement. The Agreement is subject to Minnesota Statutes, section 161.46 and any other applicable laws.

AGREEMENT

I. Term/Termination

- A. *Effective Date:* This Agreement is effective on the date the State obtains all signatures required by Minnesota Statutes, section 16C.05, subdivision 2.
- B. *Commencement of Work:* Upon notice of Agreement approval, the Utility Owner must commence and prosecute the work according to a schedule the State's Project Engineer approves.
- C. *Expiration Date:* This Agreement will expire on the date that all obligations have been satisfactorily fulfilled.
- D. *Termination by the State:* The State may terminate this Agreement at any time, with or without cause, on 30 calendar days' written notice to the Utility Owner. Upon termination, the Utility Owner will be entitled to payment, on a pro rata basis, for satisfactorily performed services. The termination of this Agreement does not relieve the Utility Owner of its obligations under the Notice and Order.
- E. *Survival of Terms:* The following articles survive this Agreement's expiration or termination: (IV) Audits; (V) Indemnification; and (VIII) Governing Terms.

II. Utility Owner's Duties

- A. The Utility Owner will complete the necessary preliminary engineering for its relocation.
- B. Use the Utility Owner's regular forces at its standard schedule of wages and working hours to accomplish all utility work. If the Utility Owner must subcontract any work at a later date, it must obtain written approval from the Utilities Engineer before awarding the contract for that work. If the subcontracted utility work costs \$10,000.00 or more, the Utility Owner must:
 - 1. Enter into a written contract with the subcontractor for that work. The contract must include or incorporate the "Audits" clause in substantially the same form as it appears in Article (IV) of this Agreement; provide a detailed breakdown of the basis for compensation; and state that there will be no "penalty" or "winding up" charges for contract termination.
 - 2. Provide copies of the contract to the State prior to its execution or before commencing work under an already executed "retainer-type" contract.

Except in an emergency or for the minor completion of a phase of work, obtain the Utilities Engineer's approval for overtime work to qualify for reimbursement.

- C. Submit one copy of the State's Application for Utility Accommodation on Trunk Highway Right of Way, Form 2525, including two copies of "proposed" sketches, for all work within the trunk highway right of way to the Utilities Engineer before beginning that work.

III. Payment

A. Cost Estimate

The estimated cost of the preliminary engineering is \$523,169.00. Exhibit A, which is attached to this agreement, shows a breakdown of this cost.

B. Payment

1. The State will pay the Utility Owner for the actual cost the Utility Owner incurs performing its obligations pursuant to this Agreement, in an amount not to exceed \$523,169.00, upon receiving:
 - a. Proof that the utility work has been completed to the Project Engineer's and the Utilities Engineer's satisfaction; and
 - b. One original, signed invoice that is supported by an itemized statement of costs. An authorized representative of the Utility Owner must sign the invoice and submit the final bill to the Utilities Engineer no later than 90 days after completing the work.
2. If acceptable to the Utilities Engineer, the State may process periodic progress billings of incurred cost without prior audit.

C. Reimbursement

1. Pursuant to the Code of Federal Regulations, title 23, part 645, subpart A, and as amended, the federal government may reimburse the State for a portion of the utility work cost the State pays the Utility Owner. The amount of the federal reimbursement will be determined upon the State's audit of the cost the Utility Owner claims according to the Agreement. The amount the State pays the Utility Owner for its relocation must not exceed the amount on which the federal government bases its reimbursement.

2. If the amount the State pays the Utility Owner exceeds the amount on which the federal government bases its reimbursement, the Utility Owner, upon the State's request, must immediately pay the difference to the State.

B. *Limitation on Payment*

1. The total amount the State is required to pay to the Utility Owner is limited to the amount in Article III.B.1.
2. If the Utility Owner deems it necessary to perform additional work not covered by this Agreement or anticipates costs exceeding the amount shown in Article III.B.1., then the Utility Owner must notify the Utilities Engineer, in writing, of the nature and cause of the additional work or costs prior to performing or incurring them.
3. If the amount the Utility Owner requests under Article III.B.1. Does not exceed 10 percent of the amount in Article III.B.1. the State may authorize payment of that pre-approved additional amount without amending this Agreement. The Utility Owner must receive notification from the State that the State approved the additional work and encumbered the additional funds before beginning the additional work, or that work will be ineligible for reimbursement.
4. If the final cost of the Utility Owner's work is more than 110 percent of the amount in Article III.B.1. this Agreement must be amended to reflect the new cost before the State will be responsible for that cost. The Utility Owner must promptly notify the State if it appears likely that costs will exceed 110 percent of the Agreement.

IV. Audits

- A. The Utility Owner's costs are subject to the State and federal government's examination and audit. Pursuant to Minnesota Statutes, section 16C.05, subdivision 5, the Utility Owner's accounting books, records, documents, procedures, and practices that are relevant to this Agreement are subject to Legislative or State Audit for six years after this Agreement expires.
- B. The Utility Owner must respond to requests for audit information to support claimed costs no later than 60 days after receiving the request or the State will cite all costs in question. If the Utility Owner does not respond during this 60-day period, the State will consider the audit citations accepted and will make payment accordingly.

V. Indemnification/Insurance

- A. The Utility Owner will defend (at its own expense and to the extent Minnesota's Attorney General allows), indemnify, save, and hold the State and all of its agents and employees harmless of and from all claims, demands, actions, or causes of action. This indemnity obligation extends to any attorney's fees the State incurs due to this Agreement and the Utility Owner's performance or nonperformance under it.
- B. The Utility Owner will defend (at its own expense and to the extent Minnesota's Attorney General allows), indemnify, save, and hold the State and all of its agents and employees harmless of and from all loss or liability for personal injury, death, or property damage that this Agreement causes anyone including, but not limited to, the Utility Owner, the State, and the State's employees. This obligation to indemnify does not include any loss or liability resulting from the State's negligence.
- C. The Utility Owner does not waive any defense or immunity of third parties. The Utility Owner, in defending any action on behalf of the State, will be entitled to assert every defense or immunity that the State could assert in its own behalf.
- D. The Utility Owner certifies that its workers' compensation insurance coverage complies with Minnesota Statutes, section 176.181, subdivision 2. The Utility Owner's employees and agents are not considered State employees. The State is not responsible for any claims asserted by the Utility Owner's employees, agents, subcontractors, or any third parties under the Minnesota Worker's Compensation Act.

VI. Nondiscrimination

- A. The Utility Owner will comply with the United States Department of Transportation's nondiscrimination regulations. These regulations are in the current version of the Code of Federal Regulation, title 49, part 21. The Utility Owner must incorporate these regulations by reference in all contracts.
- B. Minnesota Statutes, section 181.59 and any applicable local ordinances pertaining to civil rights and nondiscrimination are considered part of this Agreement.

VII. Buy America Requirements

- A. All utility work must comply with the "Buy America" provisions in 23 U.S.C. 313 and 23 CFR 635.410. If the Utility Owner uses steel or iron as part of its work, and the cost of that steel or iron is more than 0.1 percent of the total relocation cost or \$2500 (whichever is greater), it must use steel or iron melted or manufactured in the United States. Materials that have been removed from the United States for any process

(e.g., change of chemical content, shape, size, or finish) are not considered domestic materials.

- B. If the Utility Owner wishes to use foreign steel or iron, and the cost of that steel or iron exceeds the limits above, it must submit the “Stipulation for Use of Foreign Steel” to the Utilities Engineer and receive approval.
- C. Upon completing its work, the Utility Owner must sign and submit the State's Certificate of Compliance, which states that all iron and steel items are domestic. If any of the iron or steel items are foreign, the certification must include the waiver it received. The State will not process any invoices that do not include the signed Certificate of Compliance.

VIII. Governing Terms

- A. *Data Practices:* All parties must comply with the Minnesota Government Data Practices Act (Minnesota Statutes, chapter 13) as it applies to any data that a party to this Agreement receives, collects, stores, or disseminates under it. The Act provides civil liability for failure to comply with its requirements.
- B. *Applicable Law:* Minnesota law governs the validity, interpretation, and enforcement of this Agreement. Venue for all legal proceedings arising out of this Agreement, or its breach, must be in Ramsey County, Minnesota.
- C. *Waiver:* If the State fails to enforce any provision of this Agreement, that failure does not waive the provision or the State's right to subsequently enforce it.
- D. *Merger:* This Agreement contains all negotiations and agreements between the State and the Utility Owner. No prior understanding regarding this Agreement, whether written or oral, may be used to bind either party.
- E. *Assignment:* The Utility Owner may neither assign nor transfer any rights or obligations under this Agreement without the State's consent and must be signed and approved by the same parties who signed and approved this Agreement, or their successors in office.
- F. *Amendments:* Any amendment to this Agreement must be in writing. An amendment will not be effective until the same parties who signed and approved this Agreement, or their successors in office, sign and approve the amendment.
- G. *Incorporation of Exhibits:* All exhibits attached to this Agreement are incorporated into this Agreement.

County: St. Louis

Utility Owner: City of Duluth

IN WITNESS WHEREOF, the parties have caused this Contract to be duly executed to be bound hereby.

CITY OF DULUTH

By: _____

By: _____
Mayor

Its: _____

Date: _____

Date: _____

**STATE OF MINNESOTA
DEPARTMENT OF TRANSPORTATION**

State Encumbrance Verification

Individual certifies that funds have been encumbered as required by Minnesota Statutes §§ 16A.15 and 16C.05.

By: _____

Date: _____

Contract Number: _____

Order Number: _____

Department of Transportation

Recommended for Approval:

Approved:

By: _____
District Engineer

By: _____
Director, Office of Land Management

Date: _____

Date: _____

Office of Contract Management

Approved as to Form and Execution:

By: _____

Date: _____

Department of Administration

By: _____

Date: _____

COST ESTIMATE
PROFESSIONAL ENGINEERING SERVICES
CITY OF DULUTH - UTILITY RELOCATIONS
Twin Ports Interchange Project

AGREEMENT 1032661
EXHIBIT "A"

October 16, 2018

DESIGN SERVICES

LABOR COSTS - DESIGN SERVICES

JOB TITLE	MGR2	MGR1 / ENG3	ENG2	ENG1	TECH	CAD TECH	CLR	SURV	TOTAL HRS	TOTAL COST
BILLING RATE	179	163	146	130	98	81	65	146	HRS	
WATER MAIN - 22ND AVE W	10	100	100		100	200			510	\$ 58,663
SANITARY SEWER - 22ND AVE W	10	100	100		100	200			510	\$ 58,663
GAS MAIN - 22ND AVE W	10	25	25		25	50			135	\$ 16,006
									0	\$ -
LIFT STATION 15	40	100	200	340	160	240	40		1120	\$ 134,550
									0	\$ -
WATER MAIN - MICHIGAN ST	10	60	60		60	120			310	\$ 35,913
SANITARY SEWER - MICHIGAN ST	10	20	20		20	40			110	\$ 13,163
GAS MAIN - MICHIGAN ST	10	50	50		50	100			260	\$ 30,225
									0	\$ -
WATER MAIN - 19TH-21ST AVE W	10	120	120		120	240			610	\$ 70,038
SANITARY SEWER - 19TH-21ST AVE W	10	120	120		120	240			610	\$ 70,038
GAS MAIN - 22ND AVE W	10	60	60		60	120			310	\$ 35,913
									0	\$ -
TOTAL DESIGN LABOR	130	755	855	340	815	1550	40	0	4485	\$ 523,169