

**DEVELOPMENT AGREEMENT
CUSTOMS & BORDER PROTECTION FACILITY
DULUTH ENTERTAINMENT AND CONVENTION CENTER**

THIS AGREEMENT, effective as of the date of attestation by the City Clerk, is entered into between the CITY OF DULUTH, a municipal corporation created and existing under the laws of the State of Minnesota (“City”), and the DULUTH ENTERTAINMENT AND CONVENTION CENTER AUTHORITY, an authority created and existing under the Laws of Minnesota, 1963, Chapter 305 as amended by the Laws of Minnesota, 1985, First Special Session chapter 15, Section 36 and Laws of Minnesota 1998, Chapter 404 (“DECC”).

WHEREAS, City is the owner of certain property hereinafter described adjacent to the Duluth Harbor upon which is constructed the hereinafter described DECC Facility ; and

WHEREAS, by special legislation, the State has created the DECC for the purpose of managing, operating and leasing the DECC Facility to serve as a foundation for hospitality and tourism while also providing services that maximize local economic benefits; and

WHEREAS, City and DECC have the goal of establishing the City as the Minnesota and Lake Superior port of call for all cruise ships travelling the Great Lakes and, in order to fulfill that goal, need to construct a Cruise Passenger Clearance Facility (“CPCF”) as hereinafter defined and to facilitate its operation by the Customs and Border Patrol division of the U.S. Department of Homeland Security; and

WHEREAS, City and DECC are desirous of cooperating to ensure the successful construction and operation of the CPCF and, to that end, desire to enter into this Agreement setting forth the terms and conditions of said cooperative undertaking.

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

1. Definitions

The following terms and phrases shall have the meanings hereinafter ascribed to them:

- A. Customs and Border Patrol or CBP: shall mean the Customs and Border Patrol Division of the United States Department of Homeland Security.
- B. Cruise Passenger Clearance Facility or CBPF: shall mean a CBPF designed and constructed to in accordance with the Plans at the location shown on the Plans to meet the requirements of the CBP.

- C. CPCF Property: shall mean that portion of the Property and the DECC Facility to be occupied by the CPCF.
- D. DECC Facility: shall mean Duluth Entertainment and Convention Center facility located on the Property.
- E. Director: shall mean the City's Director of Property, Parks and Libraries or their designee in writing.
- F. Plans: shall mean the plans and specifications for the construction of the DBPF as shown on the plans and specifications for the CBPF attached to the City's Bid No. 22-99042 opened on January 13, 2022 at the location shown on said call for.
- G. Property: shall mean that City-owned property adjacent to the Duluth Harbor generally bounded by the Duluth Harbor Line, platted Minnesota Slip, platted Railroad Street and platted Fifth Avenue West, MUNGER'S SUBDIVISION OF DULUTH, St. Louis County, Minnesota.

2. Plans & Construction of CBPF

A. DECC Approval of Plans

DECC acknowledges that it has reviewed the Plans for the construction of the CBPF and hereby approves of the Plans. City agrees that it will make no material changes to the Plans without giving the DECC the opportunity to review and comment on said Plan changes; provided that if CBP requires that any changes be made to the Plans, City will inform DECC of said required changes and thereafter City may make changes to the Plans to conform to the requirements of CBP.

B. Construction

Upon the signing of this Agreement DECC agrees that, during the term of this Agreement as set forth in Section 4 below, the CPCF Property shall be subject to the terms and conditions of this Agreement and City and its contractors may enter upon the CPCF Property and, to the extent necessary to construct the CPCF, the Property to construct the CPCF. Said right shall specifically include but not be limited to the right to connect to and use all electrical, mechanical and electronic system of the DECC Facility. Said right of access and use shall continue from the effective date of this Agreement until the City's Director of Property, Parks and Libraries give notice to the DECC that construction of the CPCF have been

completed. Provided, however, if DECC notifies the City that there are any deficiencies in the original construction of the CPCF or the Secure Area and the Director agrees and assumes responsibility for the correction of said deficiencies, City shall have such additional access to the Property and the CPCF as is reasonably necessary to cure any such defect.

C. Contractor Insurance and Indemnity

City agrees that it will require that its general contractor constructing the CPCF insure and indemnify the DECC in the same manner and to the same degree as the City is required to be indemnified and insured.

3. Cost of Construction of the CPCF & Secure Area

City agrees that, as between the parties hereto, the City shall have sole responsibility for the cost of constructing the CPCF and the Secure Area in accordance with the Plans and as the Plans may be modified as provided for in Subparagraph A of Paragraph 2 above and that DECC shall not responsible for any related costs.

4. Operations; Agreement

A. CBP Agreement

DECC agrees that, prior to the date of the notification from the Director that construction of the CPCF and the Secure Area have been completed, it will have entered into an operating agreement with CBP for the operation of the CPCF and Secure Area which will allow the CBP to operate the CPCF in conformance with Federal regulations applicable to operation of such facilities and with the customs and practices of the CBP for the operation of such facilities. The term of such agreement shall be for a term satisfactory to CBP and DECC agrees that, upon the expiration of the initial term of such an agreement, it will extend said agreement or enter into a new agreement with the CBP meeting the same criteria as hereinbefore set forth.

B. Cruise Line Agreement

The parties agree that DECC shall serve as the booking agent for potential cruise lines to use the CPCF and to provide docking facilities along the docking facilities adjacent to the DECC. DECC agrees to use it best efforts to encourage

the use of the CPCF and secure area by such cruise lines and to conform its agreement terms to those which are reasonably customary in the industry.

C. Operating Costs

DECC agrees that it shall be solely responsible for all operating costs of the CPCF in addition to all costs of operating the DECC Facility and any related docking facilities. Nothing herein shall be deemed to prevent DECC from assessing reasonable charges to cruise lines using the CPCF as well as for any other services or facilities used by such cruise lines calling at Duluth but DECC agrees that all such charges shall be reasonably commensurate with those fees charged for the use of similar facilities in other Great Lakes Ports of Call.

D. Revenue Allocation

All revenues received by DECC from charges assessed pursuant to Paragraph C above shall be allocated in the following manner: first, DECC shall be entitled to use such revenues to reimburse itself for its actual costs of supplying goods and services to CBP and to cruise lines related to their use of the CPCF; next any revenues remaining after said allocation to DECC shall be paid to City up to an amount necessary to reimburse City for the costs of construction of the CPCF as provided for in this Agreement, said sums to be deposited in City Fund No. 258-030-4654; then if any portion of said revenue is remaining after payment of said DECC costs and said City costs, DECC shall be entitled to retain said portion of said revenues in its General Fund.

E. Reports; Books & Records

i. Reports

No later than the Fifteenth (15th) day of the month following the month in which DECC assesses or charges any fee to any cruise line for the use of the CPCF as described in Subparagraph C above, DECC shall provide a report to the City's Director of Finance in a form approved by said Finance Director setting forth all such revenues assessed or charged by DECC and setting forth all costs to be charged by DECC against said revenues as provided for in Subparagraph D above.

ii. Books and Records

DECC agrees that it will maintain all books and records pertaining to the revenues assessed or charged by DECC as provided for above in accordance with Generally Accepted Accounting Practices and that, upon receipt of a reasonable request therefore, will make all such books and records available to the City's Finance Director during ordinary business hours.

F. Operating Costs

The City and DECC agree that, as between the parties, the DECC shall be solely responsible for all costs of any kind associated with the operation of the CPCF and the Secure Area and all costs associated with the attracting of cruise lines to use the CPCF and the Secure Area and with all services provided to such cruise lines and to CBP.

5. Term

The term of this Agreement shall be deemed to be perpetual unless:

- A. The DECC Facility is demolished.
- B. The CBP notifies the City and the DECC that the CBP will not use the CPCF and the Secure Area for cruise passenger clearance purposes and such refusal is not due to the fault of the DECC.
- C. The City and the DECC mutually agree, as evidenced by resolutions of the Duluth City Council and the DECC Board of Commissioners, that the continued use of the CPCF as a cruise passenger clearance facility is no longer feasible and to terminate this Agreement.

6. Maintenance

DECC shall be responsible for all costs of cleaning, maintaining (including replacing equipment) and facilities as necessary, and operating the CPCF and the Secure Area at its own cost and at no cost to City.

7. Liability & Indemnification

Each party agrees that it will be solely liable for liability arising out of the negligent or intentional acts or omissions of itself and its officers, agents, servants, employees and contracting parties arising out of this Agreement and that it will indemnify the other party for any such liability.

8. 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 or as constituting DECC 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. DECC 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 DECC's employees while so engaged, and any and all claims whatsoever on behalf of DECC's employees arising out of employment shall in no way be the responsibility of City. Except for compensation provided in Section II of this Agreement, DECC'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 DECC from liability or judgments arising out of intentional or negligent acts or omissions of DECC 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.

9. Notices

Any notice or other communication required or given shall be in writing and shall be effective for any purpose if served, with delivery or postage costs prepaid, by nationally recognized commercial overnight delivery service or by registered or certified mail, return receipt requested, to the following addresses:

City:

City of Duluth
411 W First Street
City Hall Room 418
Duluth MN 55802
Attn: Director of Property, Parks and Libraries

DECC:

Duluth Entertainment & Convention Center
Authority
350 Harbor Drive
Duluth, MN 55802
Attn: Executive Director

10. Civil Rights Assurances

DECC, 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. 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

DECC 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. Force Majeure

Neither party shall be liable for any failure of or delay in performance of its obligations under this Agreement to the extent such failure or delay is due to circumstances beyond its reasonable control, including, without limitation, acts of God, acts of a public enemy, fires, floods, wars, civil disturbances, sabotage, accidents, insurrections, blockades, embargoes, storms, explosions, labor disputes, acts of any governmental body (whether civil or military, foreign or

domestic), failure or delay of third parties or governmental bodies from whom a party is obtaining or must obtain approvals, franchises or permits, or inability to obtain labor, materials, equipment, or transportation. Any such delays shall not be a breach of or failure to perform this Agreement or any part thereof and the date on which the party's obligations are due to be fulfilled shall be extended for a period equal to the time lost as a result of such delays.

14. 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.

15. 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.

16. 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 hereunto set their hands as of the date of attestation shown below.

CITY OF DULUTH

**DULUTH ENTERTAINMENT AND
CONVENTION CENTER AUTHORITY**

By: _____
Mayor

By: _____
Its: _____

Attest:

Date: _____

City Clerk

Date: _____

Countersigned:

City Auditor

Approved as to form:

City Attorney