

# EXHIBIT A

2/27/18 (2) REA

## MP/CITY SUPERIOR STREET RECONSTRUCTION PROJECT

THIS AGREEMENT entered into as of the date of attestation thereto by the City Clerk, by and between the CITY OF DULUTH, a municipal corporation created and existing under the laws of the State of Minnesota, hereinafter referred to as “City”, and MINNESOTA POWER, a division of ALLETE, Inc., a corporation under the laws of the State of Minnesota, hereinafter referred to as “MP”.

WHEREAS, City in its capacity as a municipal entity holds and control the public street easements in the City, including the easement for Superior Street, and as a component thereof, owns, maintains and operates water, natural gas sanitary sewer, and storm sewer mains and laterals and services or portions thereof as well as steam lines used by the City’s “District Energy Systems district heating system in and below the surface of Superior Street, which water, natural gas sanitary sewer and storm sewer mains and services lines along with the afore-said steam lines and hot water lines which will replace said steam lines as part of the subject Project are hereinafter referred to as the “City Utilities”; and

WHEREAS, City has designed the Project which will consist of the reconstruction of Superior Street from 4<sup>th</sup> Avenue East to Mesabi Avenue which will include new Utilities excluding sanitary sewer mains, new traffic signals, new street lighting and new sidewalks and paving throughout the project (the “Project”); and

WHEREAS, MP as the electric utility supplying electricity within the City of Duluth, owns and operates electrical distribution mains to provide service throughout the City including those located in the Superior Street right-of-way and is in need of installing a new electrical duct bank in the Superior Street right-of-way for the purpose of electrical power distribution to meet the needs of the City’s residents for electrical power, which project is hereinafter referred to as the “MP Project”; and

WHEREAS, City and MP have determined that it is in the best interests of both parties to have the MP Project designed, constructed and funded as a single project with a single designer and a single contractor as part of the Project, all as hereinafter provided for.

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

1. A. The Project:

The Project shall consist of the Work as described on the plans and specifications on file in the office of the City's City Engineer entitled "Construction Plan for Superior Street (MSAS 171) Reconstruction" prepared by LHB Engineers and Architects, Inc. and dated 12/11/2017, which plans and specifications are hereinafter referred to as the "Plans and Specifications".

B. The MP Project:

The MP Project shall consist that portion of the work shown on those portions of the Plans and Specifications consisting of plan and profile sheet numbers 176 through 185 inclusive and those portions of the specifications related thereto.

2. Design

A. Initial Plans and Specifications

The plans and specifications for the MP Project have been included in the Plans and Specifications. MP has reviewed those portions of the Plans and Specifications related to the MP Project as described in Paragraph 1.B. above (the "Initial Plans and Specifications for the MP Project"), approves of said portion of the Plans and Specifications and requests that the City cause the MP Project to be constructed in conformance therewith, subject to the provisions of Subparagraph B and Paragraph 5 below.

B. Changes to Plans and Specifications

1. By City

In the event that City determines that there is a need to modify the Initial Plans and Specifications for the MP Project or to make changes to the Initial Plans and Specifications for the Project which will affect the Plans and Specifications for the MP Project after they are approved as provided for in Subparagraph A. above, including change-orders and field modifications to such Initial Plans and Specifications for the Project, City shall immediately notify MP's representative, designated as provided for in Paragraph 3 below, of said determination along with a technical explanation of the need for and the extent of such modification and shall cause its design engineer to prepare, as expeditiously as possible, modified Plans and

Specifications for the Project showing such proposed modification and shall present said modified Plans and Specifications to the MP staff person designated by MP in writing to the Director as MP's representative (the "MP Representative") for review and approval. If such modification is agreed to by the MP Representative, MP agrees to pay any increase in the cost in the MP Project resulting therefrom as provided for in Paragraphs 4 and 6 below. Such modified Plans and Specifications shall become the "Plans and Specifications" for the Project for the purposes of this Agreement.

2. By MP

In the event that MP determine that there is a need to modify the Initial Plans and Specifications for the MP Project after they are approved as provided for in Subparagraph A. above, including change-orders and field modifications to the Initial Plans and Specifications for the MP Project, MP shall, as expeditiously as possible, notify the City's Director of Public Works and Utilities or his or her designee (the "Director") of the need for the modification to the Initial Plans and Specifications for the MP Project, a detailed technical explanation of the modifications needed and an acknowledgement of its agreement to pay for all costs associated with the modifications including the cost of modifying the Initial Plans and Specifications. The Director shall direct its Project engineer to prepare such requested modifications to the Initial Plans and Specifications for the Project and estimates of the cost thereof unless the Director determines, in the exercise of his or her sole discretion, that the requested modifications will have a deleterious effect on the Project which cannot be reasonably mitigated by appropriate adjustments to said requested modifications. If the Director determines to approve the requested modification, based on MP's commitment to pay any costs thereof, the Initial Plans and Specifications for the Project shall be modified in accordance with such modifications and the ~~Plans and Specifications for the Project shall be so modified and such~~ modified Plans and Specifications shall become the "Plans and Specifications" for the Project for the purposes of this Agreement.

3. Construction Exigency Modifications

In the event that the exigencies of construction make it impractical to use the process hereinbefore set forth and the Director determines that there is compelling need to modify the approved Plans and Specifications for the

Project and the proposed modification will not have a deleterious effect on the MP Project, the Director may direct the contractor to construct the Project to include such modification. The modified Plans and Specifications shall thereafter be deemed to be the “Plans and Specifications” for the purposes of this Agreement. Provided further, however, that in the event of such a unilaterally-authorized modification of the Initial Plans and Specifications, MP shall not be required to pay any of the costs associated with such modification of the Plans and Specifications for the MP Project without the subsequent approval of the MP Representative.

3. Pre-bid Cost Allocation

Based on their review of the Initial Plans and Specifications for the Project, the Director and the MP Representative have agreed that amount necessary to reimburse City for the cost of designing and constructing the MP Project is estimated to be One Million, Sixty Thousand Dollars (\$1,060,000) (the “MP Estimate”). Notwithstanding the foregoing, MP agrees to reimburse the City for all costs incurred by City for the design and construction of the MP Project as determined by and in the manner provided for in Paragraphs 4 and 6 below.

4. Bidding and Award of Project Contract

Upon completion of the processes set forth in Paragraphs 2 and 3 above, City shall request bids for construction of the Project in accordance with the Plans and Specifications and shall award the contract for the construction of the Project to the lowest responsible bidder, all in conformance with standard City of Duluth competitive bidding procedures. The bidding documents shall be structured to allow the parties to extract the costs of constructing the MP Project from the bids on the Project as a whole. Said procedure shall include conformance with the requirements of Article IV of Chapter 2 of the Duluth City Code, 1959, as amended.

5. Control of Work

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It is understood between the parties that ~~City shall provide construction~~ inspection services for the Project including the MP Project, shall have control of the construction thereof and shall be responsible for the administration thereof. MP shall have right but not the obligation to observe the construction of the Project and shall have all access to the Project site needed therefore. MP may but shall not be obligated to bring to the attention of the City any deviations from the Plans and Specifications that it may observe or otherwise determine to exist and in the event

that MP does so, the Director shall use his or her best efforts to investigate any allegations thereof, to determine the validity thereof and, in the event of any such deviation, shall use his or her best efforts to cause the deviation to be corrected.

6. MP Payment to City

Upon receipt of a request for partial payment or final payment from the contractor for work performed on the Project, the Director shall provide a copy of such request to the MP Representative for review as to work performed on the MP Project. Such requests shall denominate the portion of the work being billed which is related to the MP Project and shall be billed based on the costs established pursuant to the bids as described in Paragraph 4 above. If the MP Representative disputes any portion of the payment request as it relates to the MP Project, the MP Representative shall notify the Director of such dispute within five (5) days of such transmission thereof from the Director. If the Director does not receive any notice of any such dispute from the MP Representative, and upon approval thereof by the Director, the Director shall cause an invoice to be sent to the MP Representative setting forth the portion of said payment request requesting payment for work performed on the MP Project in accordance with the bid provide for in Paragraph 4. above. Within sixty (60) days of the Director sending said invoice to MP, MP shall cause the amount of the invoice to be remitted to City. Provided that if the MP Representative disputes that any portion of invoice as not representing costs of the MP Project as agreed to in said bid, the MP Representative shall promptly inform the Director of the particulars of such dispute and the Director and the MP Representative shall promptly meet and negotiate in good faith to resolve the dispute. Payments to City from MP shall be payable to Fund 411-035 (Permanent Improvements, Capital Projects Account

7. Independent Contractor

A. Except as herein specifically provided for, it is agreed that nothing herein contained is intended or shall be construed in any manner as creating or establishing a relationship of co-partners between the parties hereto or of constituting one party as an agent, representative or employee of the other party for any purpose or in any manner whatsoever.

B. MP and any officers or employees thereof shall not be considered an employee of City, and any and all claims that may or might arise under the Workers' Compensation Act of the State of Minnesota on behalf of MP while so engaged and

any and all claims whatsoever on behalf of MP arising out of employment or alleged employment, including without limitation, claims of discrimination against MP, its officers, agents, contractors or employees shall in no way be the responsibility of City. MP and its officers, agents, contractors and employees shall not be entitled to any compensation or rights or benefits of any hospital care, sick leave and vacation pay, Workers' Compensation, Unemployment Insurance, disability pay or severance pay from the City. Furthermore, City shall not, in any way, be responsible to defend, indemnify or save harmless MP from liability or judgments arising out of the intentional or negligent acts or omissions of MP while performing the work specified by this Agreement.

C. Any officers, employees or agents of the City shall not be considered an employee of MP, and any and all claims that may or might arise under the Workers' Compensation Act of the State of Minnesota on behalf of such City officer, employee or agent while so engaged and any and all claims whatsoever on behalf of the City arising out of employment or alleged employment, including without limitation, claims of discrimination against the City, its officers, agents, contractors or employees shall in no way be the responsibility of MP. The City's officers, agents, contractors and employees shall not be entitled to any compensation or rights or benefits of any hospital care, sick leave and vacation pay, Workers' Compensation, Unemployment Insurance, disability pay or severance pay from MP. Furthermore, MP shall not, in any way, be responsible to defend, indemnify or save harmless the City from liability or judgments arising out of the intentional or negligent acts or omissions of the City while performing the work specified by this Agreement.

8. Contractor-Insurance and Indemnity

City agrees that the contract for construction of the Project shall include a requirement that the contractor agree to defend, indemnify and insure MP in the same manner and to the same extent that such contract requires the contractor to defend, indemnify and insure the City and that the minimum insurance requirements shall be those set forth in Exhibit A attached hereto and made a part hereof.

9. Cross Indemnity

City and MP hereby agree to indemnify each other for liability arising out of their own acts or omissions and those of those of their officers, agents, servants and employees, provided that nothing herein shall create any additional liability for either party not otherwise existing under law. Provided further, that each party's

liability to the other party shall be governed and limited by the provisions of Minnesota Statutes Chapter 466 (even though these statutory limitations would not normally apply to MP). For the avoidance of doubt, this indemnity does not apply to the acts or omissions of a party's third party contractors for design, engineering or construction services, as contemplated by Paragraphs 2, 4 and 5. Each party agrees that any claims for indemnity, insurance or warranty against such third party contractors shall be against the applicable third party contractor. Each party agrees to provide reasonable cooperation with the other party in the event of any such claim against a third party contractor.

10. Warranties

City and MP agree that any contract entered into by either party for the design or construction or both of any portion of the Project shall specifically provide that the other party shall be deemed to be an intended third party beneficiary of any warranties arising out of work performed pursuant to such contract to the extent that such party's interests shall bear.

11. 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.

12. Notices

Notices to be given hereunder shall be deemed to be sufficient if deposited in the U.S. Mail, postage prepaid to the address set forth below or if sent by e-mail to the e-mail address set forth below unless a party shall send notice to the other party as herein provided directing that such notices shall be sent to a different address:

In the case of City: Director of Public Works and Utilities  
City of Duluth  
411 West First Street, Room 211B  
Duluth, MN 55802  
JBenning@duluthmn.gov

In the case of MP: Purchasing and Contracts  
Minnesota Power, a division of ALLETE, Inc.  
30 West Superior Street  
Duluth, MN 55802  
lholden@allete.com

13. Applicable Law

This Agreement is made in the State of Minnesota and shall be interpreted in accordance with the laws of the State of Minnesota.

IN WITNESS WHEREOF, the parties have hereunto set their hands.

CITY OF DULUTH, a Minnesota  
Municipal Corporation

MINNESOTA POWER a division of  
ALLETE, Inc a Minnesota Corporation

By: \_\_\_\_\_  
Mayor

By: *Larissa Holden*  
Its Larissa Holden  
Purchasing Supervisor

Attest:

By: \_\_\_\_\_  
City Clerk

Date: \_\_\_\_\_



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Approved:

Countersigned:

\_\_\_\_\_  
Assistant City Attorney

City Auditor