

MP/CITY  
2017 MICHIGAN STREET UTILITY 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 controls the public street easements in the City, including the easement for Michigan Street, and as a component thereof, owns, maintains and operates a 16 inch water main and 2 inch and 3 inch natural gas mains in and below the surface of Michigan Street, which water main and natural gas mains and new and replacement mains are hereinafter referred to as the “City Utilities” and the replacement of which is hereinafter referred to as the “City 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 Michigan Street right-of-way and is in need of installing a new duct in the Michigan 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, in 2016 City and MP entered into City Contract No. 22806 for the construction of the City Project and the MP Project within bounds of the Project Area as defined in that Contract; and

WHEREAS, in 2017 City and MP wish to continue to construct the City Project and the MP Project within the bounds of the Project Area as hereinafter defined in Section 1.A. below; and

WHEREAS, City and MP have determined that it continues to be in the best interests of both parties to have that portion of the MP Project and the City Project lying within the Project Area defined below, hereinafter referred to as the “Project”, designed, constructed and funded as a single project with a single designer and a single contractor, 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. The Project

The Project shall consist of City Project and the MP Project.

A. The City Project:

The City Project shall consist of the replacement of the existing 16 inch cast iron water main with a 20 inch HDPE water main and the addition of a new 6 inch MDPE natural gas main in Michigan Street from 1st Avenue West to 3<sup>rd</sup> Avenue West (the "Project Area") and shall include the excavation of the subsurface under Michigan Street in the Project Area as necessary to a depth sufficient to remove the existing City water main including protecting the existing City gas mains and the existing electrical distribution duct currently existing below Michigan Street, the installation of the new water main and natural gas main as described above and the backfilling of said excavation and compacting of such fill material to meet City specifications for backfilling trenches in conjunction with utility replacement projects to the design elevation of the new MP duct.

B. The MP Project:

The MP Project shall consist of the demolition of the existing street in the Project Area and including up to the next existing joints between concrete panels at either end of the Project Area, the design and installation of a new concrete electrical duct encasing six 6 inch electrical conduits through the Project Area which will include backfilling and compacting the above-reference excavation to the level specified for the installation of the new MP duct, the installation of the new MP duct, the backfilling and compacting of the excavation in Michigan Street in conformance with standard City specifications therefore on file in the office of the City Engineer to final elevation for installation of a replacement concrete street in the Project in conformance with said specifications and the installation of the completed concrete driving surface area including all portions of the street demolished as hereinafter set forth in accordance with said specification. Management, supervision and acceptance of the LHB design and of contractor's performance and work under the contract

contemplated in Paragraph 4 are solely within the discretion of the City with regard to all elements of the MP Project other than the installation of the MP duct.

2. Design

A. Initial Plans and Specifications

City and MP agree that MP shall contract for the design services of LHB Engineers and Architects, Inc. (“LHB”) to design the Project except for the new 20 inch HDPE water main and the addition of a new 6 inch MDPE natural gas main to be constructed as part of the City Project. City agrees that it will consult with LHB on design of the street demolition, backfilling and compacting, and installation of a replacement concrete street as and to the extent requested to by LHB to ensure that City specifications identified in Paragraph 1.B. are met. City and MP agree that City shall contract for the design services of LHB to design the new 20 inch HDPE water main and the addition of a new 6 inch MDPE natural gas main portions of the City Project, and to prepare plans and specifications for the entire Project including bid documents for the construction of the Project as a unitary project by a single contractor. The bid documents shall require bidder to provide bids for all quantities and elements of the work such that City and MP can determine the relative costs associated with the City Project and the MP Project. LHB has provided plans and specifications for the construction of the Project, which plans and specifications are on file in the Office of the City’s City Engineer bearing City Job No. 1601 and dated February 23, 2017. The parties hereto agree and stipulate that they have reviewed said plans and specifications and have accepted and approved the same for bidding and construction of the Project. City is authorized to proceed to bid the construction of Project and proceed with the construction therein in accordance with the plans and specifications so approved (the “Initial Plans and Specifications”) and with the terms and conditions of this Agreement. The Initial Plans and Specifications shall require that construction of the Project be completed no later than October 14, 2017.

B. Changes to Plans and Specifications

In the event that City or MP determine that there is a need to modify the Initial Plans and Specifications after they are approved as provided for in Subparagraph A. above, including change-orders and field modifications to the Initial Plans and Specifications, the party making such determination shall cause its design engineer to prepare, as expeditiously as possible, modified Plans and

Specifications showing such proposed modification and shall present said modified Plans and Specifications to the other party's representative designated as provided for in Paragraph 3. below for review and approval, and if approved by the other party, for allocation of any cost thereof as provided for in Paragraph 4 below. Provided, however, that in the event that the exigencies of construction make it impractical to use the process hereinbefore set forth and the party responsible for the affected portion of the Project determines that there is compelling need to do so and the proposed modification will not have a deleterious effect on the other party's portion of the Project, said party 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, the non-approving party shall not be required to pay any of the costs associated with such modification without the subsequent approval of that party's designated representative.

3. Pre-bid Cost Allocation

City's Director of Public Works and Utilities or his or her designee (the "Director") have met with the MP staff person designated by MP in writing to the Director as MP's representative (the "MP Representative") and, using the quantities and elements specified in the bid forms, have agreed that the Bid Tabulation, a copy of which is attached hereto as Exhibit B, shall be the basis for the allocation of the costs of all quantities and elements of the Project to the City Project and to the MP Project.

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. 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

The contract for the construction of the Project shall include provision that, subject to the Plans and Specifications, and subject to the City's rights in

Paragraph 1.B., MP shall have direct, control and supervision of the MP Project and MP shall provide, directly or through one or more engineering services providers, construction engineering services, including approval of the work and materials testing, with regard thereto including any construction inspection the MP Representative shall deem appropriate. Said contract shall require MP's approval of the construction of the duct within the MP Project in accordance with the Plans and Specifications, which approval shall not be unreasonably withheld. Said contract shall further provide that, subject to the Plans and Specifications, City shall direct control and supervision of the City Project and shall provide construction engineering services with regard thereto including any construction inspection the Director shall deem appropriate.

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. 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) business 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 Allocation provide for in Paragraph 3. above. Within thirty (30) days of MP's receipt of said invoice, 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 Allocation, 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.

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 and MP agree that all contracts for design and construction of the Project shall include a requirement that the contractor agree to defend, indemnify and insure the other party in the same manner and to the same extent that such contract requires the contractor to defend, indemnify and insure the contracting party 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.

10. 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.

11. 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

12. 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.

*[The balance of this page is left blank intentionally; signatures appear on the following page]*



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: \_\_\_\_\_  
Its: \_\_\_\_\_

Attest:

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

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

Approved:

Countersigned:

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

\_\_\_\_\_  
City Auditor

## Exhibit A MP Insurance Requirements

Contractor shall purchase and maintain such insurance as shall protect Contractor and MP from claims which may in any way arise out of or be in any manner connected with the performance of the Agreement, whether such claims arise out of the act or failure to act of Contractor, MP, or of the direct or indirect delegee, appointee or employee of either. Contractor shall provide evidence of all such insurance at the request of MP. Such insurance shall be as specified below, and, except for worker's compensation, all insurance policies shall name MP as an additional insured with insurance companies that are (a) authorized to do business under the laws of the State(s) in which Contractor conducts business related to this Agreement, and (b) rated A- or better by A.M. Best rating service in amounts not less than:

Worker's Compensation statutory limit;

Employer's Liability in the amount of one million dollars (\$1,000,000);

Commercial General Liability, occurrence form, providing bodily injury, personal injury, and property damage liability coverage with limits of not less than two million dollars (\$2,000,000) per occurrence, four million dollars (\$4,000,000) aggregate and including but not limited to Broad Form Property Damage with no explosion, collapse and underground (XCU) exclusions, and contractual liability coverage for the indemnity promise contained herein; and

Comprehensive Automobile Liability with combined single limits of not less than two million dollars (\$2,000,000).

Professional liability insurance covering Contractor and any architect-engineer of contractor for errors, omissions or negligent acts arising out of the performance of (or the failure to perform) professional services hereunder as an architect or engineer. Such insurance will have a limit of liability of not less than \$1,000,000 (one million dollars) for each claim, and not less than \$5,000,000 (five million dollars) in the aggregate and will remain in effect for a period of two (2) years after the date on which the project achieves commercial operation.

All dollar amounts of coverage set forth above shall be per occurrence and in the aggregate and include a cross liability and severability of

interest clause. The policies described herein shall (i) be endorsed to show that the insurers waive subrogation against MP, its affiliates, directors, officers and employees, (ii) the insurance is primary and non-contributory, and (iii) not expire, terminate or otherwise discontinue coverage except upon not less than thirty (30) days prior written notice to MP.

Certificates of insurance acceptable to MP shall be filed with MP prior to commencement of the work. These certificates shall contain a provision that should coverages afforded under the policies be canceled before the expiration date thereof, notice will be delivered to MP. Notwithstanding the foregoing, Contractor has a continuing obligation to provide the insurance coverage described in this Exhibit A and none of the insurance required herein shall be canceled, changed or allowed to lapse until the period of Contractor's obligations under the Agreement has been completed. Such notices shall be sent to MP.

Insurance specified herein shall be minimum requirements and Contractor is responsible for providing any additional insurance deemed necessary to protect the interests of both Contractor and MP from other hazards or claims in excess of the minimum coverage. The liability of Contractor under any warranty or indemnity provision contained in the Agreement is not limited to available insurance coverage.