

**Agreement between
Johnson County and the City of Olathe
For Construction of a Stormwater Management Project known as
167th Terrace and Black Bob Stormwater Improvements
BR-09-001**

This agreement is entered into by and between the Board of County Commissioners of Johnson County, Kansas (the "County") and the City of Olathe (the "City") pursuant to K.S.A. 12-2908.

Recitals

1. Pursuant to K.S.A. 19-3311, by Resolution No. 38-90, the County has established a county-wide retailer's sales tax for the purpose of providing funds for stormwater management projects, and by Resolution No. 76-90, created a Stormwater Management Advisory Council to identify and recommend projects for inclusion in the Stormwater Management Program.
2. The County has established a Stormwater Management and Flood Control Fund for the purpose of funding Stormwater Management Program projects.
3. The County, by Resolution No. 66-92, as modified by Resolution No. 034-94, adopted the Johnson County Stormwater Management Policy and the Administrative Procedures for the Johnson County Stormwater Management Program ("Policy and Procedures") to promote interlocal cooperation between the County and the participating municipalities in stormwater management activities.
4. The County has established a Five-Year Master Plan consisting of a list of proposed stormwater management projects that meet the established criteria for funding from the Stormwater Management and Flood Control Fund. The County, upon the recommendation of the Stormwater Management Advisory Council, has selected certain projects from the Five Year Master Plan to be included in the County's Project Priority List which contemplates the timely design and construction of those selected projects.
5. In accordance with the Policy and Procedures, the City has requested that the County participate in the funding for the construction of the stormwater management project identified as 167th Terrace and Black Bob Stormwater Improvements (the "Project"), which Project is on the County's Project Priority List, and the County is willing to provide such funding upon the terms and conditions set forth in this agreement.

Agreement

In and for the consideration of the mutual covenants contained in this agreement and the mutual benefits to be derived from the Project, the City and the County agree as follows:

- **Policy and Procedures.** The City acknowledges receipt of the Policy and Procedures. The City and County agree that the Project shall be undertaken, constructed, and administered in accordance with the terms and provisions of the Policy and Procedures provided, however, in the event a conflict exists between any provision of the Policy and Procedures and any provision of this agreement, the terms and conditions of this agreement shall control.
- **Estimated Project Cost.** The parties acknowledge and agree that this agreement obligates the parties to proceed with the construction phase of the Project. For budget and accounting purposes, the total project cost including the design engineering, estimated construction engineering and construction costs of the construction phase of the Project is Five Million Six Hundred Thirty Three Thousand Three Hundred Thirty Three Dollars (\$5,633,333) based upon engineering and design assumptions which the construction contract bid prices and construction inspection contract prices may or may not confirm.
- **Option to Terminate.** Upon receiving construction bids for the Project, the City shall determine the total engineering and construction costs for the construction phase of the Project based upon contract bid amounts. Within seven days of the construction contract bid date, the City shall notify the County, in writing, of the total engineering and construction costs for the construction phase of the Project. In the event total estimated construction engineering and construction costs for the construction phase of the Project exceed the Stormwater Management Program's estimated construction phase cost of the Project, the City and the County each shall have the option of terminating this agreement as set forth in this Paragraph.

The City agrees to notify the County whether it desires to terminate this agreement within thirty days following the bid date of the contract. Within thirty days after the City gives its notice of intent to terminate this agreement to the County, the County may, at its option, elect to contribute additional funds to the Project in an amount sufficient to cover any and all additional expenditures over and above the design and estimated construction cost of Five Million Six Hundred Thirty Three Thousand Three Hundred Thirty Three Dollars (\$5,633,333) in which event this agreement shall not terminate but shall continue in full force and effect except that the County's obligation for Project costs shall be increased accordingly.

Should the total engineering and construction costs for the construction phase of the Project exceed the amount of this agreement, the County agrees to either:

- a. Notify the City of the County's intent to terminate this agreement and re-prioritize the Project within thirty days of the receipt of the notification of total engineering and construction costs for the construction phase of the Project, or;
- b. Authorize the City to proceed with the construction of the Project.

Within thirty days after the County gives its notice of intent to terminate this agreement to the City, the City may, at its option, elect to contribute additional funds to the Project in an amount sufficient to cover any and all additional expenditures over and above the amount of this agreement in which event this agreement shall not terminate but shall continue in full force and effect except that the City's obligation for the Project costs shall be increased accordingly.

Within sixty days from the date of the termination of this agreement as provided in this Paragraph, the City shall provide the County with a final accounting of Project costs and the County's share of such costs whereupon the County shall reimburse the City subject to the limitations set forth in the Policy and Procedures and in this agreement.

Upon the termination of this agreement as provided in this Paragraph, the Project shall be re-prioritized according to the Policy and Procedures.

- **Project Construction.** The City agrees to select a responsible and qualified contractor or contractors to undertake and complete the construction of the Project according to the Final Plans and Specifications ("Project Contractor"). The parties agree that it shall be the City's obligation to comply with and, to extent reasonably practical, to require the Project Contractor comply with, all applicable laws and regulations governing public contracts, including all applicable non-discrimination laws and regulations.
- **Administration of Project.** It is acknowledged and agreed that the City shall enter into all contracts relating to the Project in its own name and not as the agent of the County. The City agrees to be solely responsible for the administration of all construction and other contracts for the Project. Any contract disputes shall be resolved by the City at the City's sole cost and expense.

The City shall be responsible for requiring adequate performance and payment bonds for the Project from the Project Contractor. The City shall discharge and satisfy any mechanic's or materialman's lien that encumbers the Project and the costs thereof shall not be considered a reimbursable cost under this agreement. Notwithstanding the foregoing, costs and expenses, including reasonable attorneys' fees, incurred by the City to enforce a contract of indemnity under a performance or payment bond shall be reimbursable, subject to any limitations on reimbursement set forth in the Policy and Procedures or this agreement.

The City shall require adequate indemnity covenants and evidence of insurance from contractors and engineering service providers for loss or damage to life or property arising out of the contractor's or engineering service provider's negligent acts or omissions. The required insurance coverage and limits shall be established by the City but shall not, in any event, be less than \$2,000,000 on a per occurrence basis for general liability coverage for the general contractor and \$1,000,000 professional liability coverage for engineering service providers. The City may, in the exercise of its reasonable judgment, permit any insurance policy required by this agreement to contain a reasonable and customary deductible or co-insurance provision.

The City shall submit to the Finance Director, upon execution of this agreement, a monthly projection of cash flow expenditures for the Project, in substantially the form set out in Exhibit B attached hereto.

- **County Contribution Toward Project Costs.** The County shall reimburse the City from the Stormwater Management and Flood Control Fund for expenditures made by the City for the Project as follows:

Not more than once each calendar month, the City shall submit to the County a request for payment, invoice, or statement satisfactory in form and content to the County Stormwater Engineer detailing total Project costs and expenses, in line-item detail, for the preceding calendar month ("Payment Request") and for year-to-date.

The City's Payment Request shall list, by category, those particular expenditures that are reimbursable according to the Policy and Procedures. The City represents and warrants that each Payment Request shall seek reimbursement for only those expenditures that the City determines, in good faith, to be reimbursable by the County. The County Stormwater Engineer may require the City to supplement the Payment Request as needed to satisfy the County Stormwater Engineer, at his discretion, that the Payment Request accurately reflects properly reimbursable costs and expenses.

The County agrees to make payment to the City within thirty days following the County Stormwater Engineer's approval and acceptance of a properly documented Payment Request in an amount equal to seventy-five percent (75%) of the Payment Request.

Within sixty days from the date of the completion of the Project, the City shall provide the County with a final accounting of Project costs and the County's share of such costs, whereupon the County shall make a final reimbursement to the City as provided in this agreement. For purposes of this agreement, the Project shall be deemed complete on the earliest date upon which any of the following events occur:

- a. The City notifies the County that the Project is complete, subject to usual and customary "punch list" items.
 - b. The Project architect or construction engineer issues to the City a certificate of substantial completion for the Project.
 - c. The date the County Stormwater Engineer certifies, in good faith, that the Project is substantially complete following an inspection of the Project by the County Stormwater Engineer who shall be accompanied by a City representative.
- **Limitation of Liability.** To the extent permitted by law and subject to the provisions of the Kansas Tort Claims Act, including but not limited to maximum liability and immunity provisions, the City agrees to indemnify and hold the County, its officials, and agents harmless from any cost, expense, or liability not expressly agreed to by the County which result from the negligent acts or omissions of the City or its employees or which result from the City's compliance with the Policy and Procedures.

This agreement to indemnify shall not run in favor of or benefit any liability insurer or third party.

In addition, the City shall, and hereby agrees to, insert as a special provision of its contract with the Project Contractor chosen to undertake the Project construction as contemplated by this Agreement the following paragraphs:

The Project Contractor shall defend, indemnify and save the Board of County Commissioners of Johnson County, Kansas and the City harmless from and against all liability for damages, costs, and expenses arising out of any claim, suit, action or otherwise for injuries and/or damages sustained to persons or property by reason of the negligence or other actionable fault of the Project Contractor, his or her sub-contractors, agents or employees in the performance of this contract.

The Board of County Commissioners of Johnson County, Kansas shall be named as an additional insured on all policies of insurance issued to the Project Contractor and required by the terms of his/her agreement with the City.

- ***Only if the City has proposed a Project design that contemplates a deviation from the American Public Works Association (APWA) specifications contained in Section 5600 Storm Drainage Systems and Facilities, shall the following provisions apply:***

- a. The City represents that it has determined that APWA Section 5600 specifications are not feasible, are impractical, or cannot be met without an expenditure of funds that, in the City's opinion, significantly exceeds the anticipated Project benefit.
- b. The City represents that, based upon its own analysis, the APWA Section 5600 specifications set forth on the attached Exhibit _____ are not feasible, are impractical, or cannot be met without an expenditure of funds that significantly exceeds the anticipated Project benefit.
- c. The City acknowledges and agrees that the costs of "flood proofing" any structure within the Project area shall not be a reimbursable expense under the Stormwater Management Program but shall be borne solely by the City. "Flood proofing," for purposes of this section, means any method by which a structure's windows, doors, or other openings are covered or sealed in an effort to prevent flood water entering the structure through such openings.
- d. The City acknowledges that it has, in its sole and absolute discretion, determined to deviate from APWA Section 5600 specifications by approving a Project design that may result in seven inches or more of water flooding over a street or roadway during a 100 year storm event. The City hereby represents that:
- e. The City has concluded that the relevant APWA Section 5600 specifications are not feasible, are impractical, or cannot be met without an expenditure of funds that, in the City's opinion, significantly exceeds the anticipated benefit.
- f. The City agrees to and shall develop an emergency plan to protect life and property at the anticipated flooded crossing point during a 100-year storm or other high-water event.
- g. The City represents that it has endeavored to advise its citizens in and near the Project area of the City's proposed deviation from APWA Section 5600 specifications and its alternative plans to protect life and property at the flooded crossing point during a 100 year storm or other high-water event.

- h. The City agrees to and shall take appropriate measures to protect the public at low-water crossings, which are allowed to exist as part of the City's Project.
- i. The City acknowledges that it is deviating from the APWA Section 5600 specifications upon its discretion based upon its own investigation, analysis, and risk assessment and without reliance upon SMAC or the Board of County Commissioners, or their respective employees or agents. To the extent permitted by law and subject to the maximum liability provisions of the Kansas Tort Claims Act the City expressly agrees to and shall hold SMAC and the Board of County Commissioners, and their respective employees and agents, harmless from any property loss, property damage, personal injury, or death arising out of the construction of the Project.

The City also agrees that notwithstanding any assistance, advice, technical consulting, or engineering services provided by SMAC or the Board of County Commissioners, or the failure to provide any such assistance, advice, technical consulting, or engineering services, the City shall bear the sole and absolute responsibility for the Project's design, construction, maintenance, and repair.

- **Notice Addresses.** Any notice required or permitted by this agreement shall be deemed properly given upon deposit in the U.S. mail, postage prepaid and addressed as follows:

If to the County:

Mr. Kent Lage, P.E.
Urban Services Manager
Johnson County Public Works
1800 W. Old 56 Highway
Olathe, KS 66061

If to the City:

Rob Beilfuss
Stormwater Manager
City of Olathe
1385 S. Robinson
Olathe, KS 66061

In addition, any notice required or permitted by this agreement may be sent by telecopier or hand delivered and shall be deemed properly given upon actual receipt by the addressee.

- **Effective Date.** Regardless of the date(s) the parties execute the agreement, the effective date of this agreement shall be _____ provided the agreement has been fully executed by both parties.

**Board of County Commissioners Of
Johnson County, Kansas**

City of Olathe

Ed Eilert, Chairman

John Bacon, Mayor

Attest:

Attest:

Lynda Sader
Deputy County Clerk

City Clerk

Approved as to Form:

Approved as to Form:

Robert A. Ford
Assistant County Counselor

City Attorney