

**COOPERATIVE AGREEMENT BETWEEN
THE CITY OF DES MOINES AND REDONDO HEIGHTS CONDOMINIUM
ASSOCIATION FOR THE
REDONDO HEIGHTS CULVERT REPLACEMENT**

WHEREAS, the City of Des Moines, Washington (hereinafter "City") is undertaking a capital improvement project known as the Redondo Heights Culvert Replacement Project (hereinafter "the Project"); and

WHEREAS, the existing corrugated metal culvert is severely corroded and needs to be replaced; and

WHEREAS, the City of Des Moines intends to replace its portion of the culvert located within a public drainage easement representing approximately 76 percent of the overall cost; and

WHEREAS, the Redondo Heights Condominium Association (hereinafter "Association") intends to replace its portion of the culvert located on Redondo Heights Condominium property representing approximately 24 percent of the overall cost; and

WHEREAS, the Association's share of the project cost is estimated at \$108,000; and

WHEREAS, integrating the Association's work into the City's design and construction of the Project would be more expedient, less expensive, and less disruptive to the public than if the Association undertook this work separately; and

WHEREAS, the City and the Association (individually a "Party" and collectively the "Parties") mutually desire to establish a formal arrangement under which the Association will pay the City in exchange for the City's incorporating the Association's related utility work into the design and construction of the Project; and

WHEREAS, the Parties desire to enter into this Agreement for the purpose of defining their respective rights, obligations, costs, and liabilities regarding this undertaking; and

WHEREAS, the City Council of the City of Des Moines has taken appropriate action for the City's approval of and entry into this Agreement ("Agreement"); and

WHEREAS, the Board of Directors of the Association has taken appropriate action for the Association's approval of and entry into this Agreement;

A handwritten signature in black ink, appearing to read "AT KD", is located in the bottom right corner of the page.

NOW, THEREFORE, in consideration of the terms, conditions and covenants contained herein, the Parties agree as follows:

TERMS

Section 1. Purpose. The purpose of this Agreement is to establish a formal arrangement under which the Association will pay the City to incorporate the design of the Association's culvert replacement into the Project contract documents and to construct said culvert work in conjunction with the City's design and construction of the Project. The terms, conditions, and covenants of this Agreement shall accordingly be interpreted to advance this purpose. This Agreement further seeks to allocate and define the Parties' respective rights, obligations, costs and liabilities concerning the establishment, operation and maintenance of this undertaking. By signing this agreement, the Association warrants that it has received approval of its members and that all members will be legally and individually bound by the terms of this agreement.

Section 2. Term. This Agreement shall be effective upon execution by the Parties hereto. Unless terminated in accordance with Section 3, or Section ~~4.H~~^{4.G}, this Agreement shall remain effective until one of the following events, whichever is later: (a) the Association's written acceptance of and payment for all of the Association's work provided pursuant hereto, or (b) December 31, 2012, in the event the project work has not been commenced. Thereafter, the agreement shall expire automatically. The Parties may at their option renew this Agreement for a mutually agreed upon term by a writing signed by both Parties.

Section 3. Termination. Either Party may terminate this Agreement with or without cause, prior to the commencement of the Association's culvert work ("Association Work"), by providing the other Party with 30 days written notice of its intent to terminate. Termination or expiration shall not alter the Association's payment obligations under Section 6 for services already rendered, as well as for the normal and reasonable costs incurred by the contractor in terminating and closing out the Association's portion of the work, and shall not alter the Parties' obligations under Section 10 of this Agreement.

Section 4. Obligations of the Association. The Association agrees to:

A. Provide periodic payments to the City to reimburse the City for its costs of designing and constructing the Association Work pursuant to Section 6 of this Agreement, and as follows:

1. Engineering/Design

The Association shall reimburse the City \$14,700 for engineering and design to incorporate the design of the Association's Work into the construction plans, specifications, and contract documents for the Project.

2. Bid Process. The Association shall participate in the bid process as follows:



- i. Accept or reject bids on bid items associated with Association Work. The Association Work shall be included as a separate schedule in the contract and include the following bid items:
 - “All pipes, structures, and appurtenances related to the Association’s culvert”
 - “Mobilization”
 - “Property Restoration”
 - “Removal/Abandonment of the existing culvert”
 - “Removal of pavement and new pavement”
 - “Shoring or extra excavation Class B”
 - “Crushed gravel as pavement base material”
 - “Removal and replacement of unsuitable material”
 - “Foundation material”
- ii. Within ten (10) days of receiving the bid tabulation from the City, the Association shall notify the City in writing that the Association either; agrees to proceed with the Association Work, or the Association chooses to complete its work on their own as a separate project.

3. Construction. The Association shall reimburse the City for the City’s actual costs for construction of the Association Work based upon:

- i. Contractor’s bid prices for the Association Work, the actual quantities of work installed, and the final actual costs of construction. The engineer’s estimate for the Association Work, excluding sales tax, is approximately \$81,000.
 - ii. All Washington State Sales tax associated with the Association work. This amount will be equal to 9.5% of the total price of the Association Work. Based on the estimated construction cost of \$81,000, the estimated sales tax amount is approximately \$7,695.
- B. The Association shall also reimburse the City for the Association’s share for construction engineering, management and inspection services. The Association’s fixed amount of the construction engineering, management and inspection cost is at \$4,750.
- C. Respond promptly to information requests submitted by the City or its agents regarding the Association Work.
- D. Provide access to the Redondo Heights property for the contractor, the City or its agents during the term of this agreement.

Handwritten signature and initials in blue ink, appearing to be 'AJ' followed by 'KD'.

- E. Upon satisfactory completion of the Association's Work, provide written acceptance of the Association Work to the City.
- F. The Association shall notify the City, verbally and in writing, of any disapproval of said work and provide said notification to the Contractor prior to progress payment for said work.
- G. If the Association decides to reject the bid for the Association's bid items, then the Association acknowledges that construction of the Association Work will be processed under a separate contract by the Association. The Association will be responsible only for reimbursing the City costs already incurred under Section 4.A.1.

Section 5. Obligations of the City. The City agrees to:

- A. Incorporate the design of the Association Work into the construction plans, specifications, and contract documents for the Project. The Association Work will be under separate bid items/schedule in such a manner as to allow identification of cost allocations between the Association Work and the Project work.
- B. Assume responsibility for constructing the Association's work in accordance with the plans, specifications, and contract documents, including but not limited to securing all necessary consultants, contractors, and subcontractors. All construction contracts shall be procured through a formal competitive bidding process consistent with applicable State law. The City shall have sole authority to award and manage the construction contract per the terms of this agreement.
- C. Submit to the Association written invoices for payment in accordance with Section 6. Include copies of invoices or other documentation from consultants and/or contractors, and City costs clearly indicating the Association's portion of the invoices.
- D. Assume lead agency status and responsibility for applying for and obtaining any and all regulatory permits and approvals necessary to complete the Project, including but not limited to right-of-way permits and SEPA approvals.
- E. The City shall notify an Association representative of all construction meetings and shall allow the Association representative to participate in all construction meetings.
- F. Respond promptly to information requests submitted by the Association or its representative regarding the Project.
- G. The City shall require the contractor to be responsible for compliance with all applicable federal, state and local statutes, regulations and ordinances regarding safety.

Handwritten signature and initials in blue ink, appearing to be 'AJ KD'.

H. The City shall require the contractor to provide labor and material lien waivers and/or releases in connection with all aspects of the Association Work.

Section 6. Payment Schedule. The Parties agree to the following billing and payment schedule:

- A. The cost incurred by the City to incorporate the Association work design has been pre-determined to be \$14,700. (Section 4.A.1). The Association shall tender payment to the City in the form of a check, money order, or other certified funds in this amount within thirty (30) days of execution of this Agreement.
- B. The cost for construction engineering, management and inspection costs incurred by the City for the Association's work on the Project has been pre-determined to be \$4,750. (Section 4.B). The City shall submit an invoice to the Association for this amount upon physical completion of the Association's Work.
- C. To the extent reasonably possible, the City shall document and tabulate separately the actual quantities of work installed to clearly identify the Association's portion of the Project construction cost for the Association Work. The City will withhold an amount of payment of 5% (retainage) of the contract amount from the contractor until the contractor has provided all labor and material lien waivers and/or releases for the project upon completion of the Project. The City will invoice the Association on a monthly basis for that the portion of the Association work completed (minus the 5% retainage) (Section 4.A.3). Final adjustment of costs shall be delivered to the Association within thirty (30) days of project close out.
- D. Within thirty (30) days of receiving any invoice, the Association shall tender payment to the City in the form of a check, money order or other certified funds for the invoiced amount, except as to any disputed amounts.
- E. In the event that the Parties disagree regarding the Association's share of any expense incurred by the City regarding the Project, the Parties may agree to submit the question for resolution in accordance with the mediation/arbitration clause contained herein.

Section 7. Change Orders and Authorization of Cost Overruns:

- A. Change Orders. The Association shall have the right to approve or reject change orders relating to the Association Work. The City shall have the right to approve or reject change orders relating to the City's work. The Parties shall mutually accept or reject change orders relating to joint work. Any dispute between the Parties as to proportional payment for joint element change orders shall be resolved pursuant to the mediation/arbitration clause contained herein.



B. Cost Overruns. The City is authorized, subject to the limitations of this paragraph, on behalf of the Association to negotiate and approve all unit price over-runs in bid quantities and change orders related to the installation of the Association Work. The Association also authorizes the expenditure by the City of a contingency of up to 10% of the contractor's total price for the Association's bid items for over-runs in bid quantities and change orders associated with the installation of the Association's Work. For any quantity overruns that cause the cost of the Association's Work to exceed the authorized 10% contingency amount, the City will notify the Association in writing requesting a letter of concurrence allowing the City to exceed the 10% contingency before proceeding with the work. The letter will include an explanation of the changed conditions necessitating exceeding the previously approved contingency. A letter of concurrence shall be provided to the City within a reasonable time frame so as to not cause a Project delay. If there is a potential delay due to extra work or a change order, the City will indicate in this notification to the Association along with a time for response required from the Association. The City will include a progress schedule and any change orders for the Association Work with the Association's monthly invoice. In any event and even without a letter of concurrence from the Association, the City is authorized to take any reasonable action and to expend any reasonable amount of money to assure that the Association Work will not interfere or delay the timely completion of the project. Any disputes as to the reasonableness of the City's actions or expenditures for the Association Work will be resolved pursuant to the mediation/arbitration clause contained herein.

Section 8. Ownership and Disposition of Property. Upon completion of the project, the Association agrees to grant a public drainage easement to the City for that portion of the Association work that conveys Redondo creek through the property. The form of the easement agreement ("Easement") shall be approved by both parties, and shall provide for a maximum easement width of ten (10) feet. The Easement shall provide that all future maintenance, repair and replacement of the drainage system shall be the responsibility of the City of Des Moines. All other work constructed under the Project within the property limits of the Redondo Heights Condominiums that is not currently located within an existing public drainage easement or the proposed public drainage easement shall remain the exclusive property of the Association upon completion.

Section 9. Administration; No Separate Entity Created. The City of Des Moines Planning, Building, Public Works Director, or his/her designee, shall serve as the City's administrator of this Agreement. The Association President, or his/her designee, shall serve as the Association's administrator of this Agreement. No separate legal entity is formed by this Agreement.

Section 10. Release, Indemnification and Hold Harmless Agreement. Each party agrees to defend, indemnify and hold the other party, its officers, officials, employees, agents and volunteers harmless from any and all claims, injuries, damages, losses or suits, including all legal costs and attorney fees, arising out of or in connection with the performance of or failure to perform this Contract, including claims for injuries and damages caused by a party's negligence,



breach of contract or intentional acts. The provisions of this section shall survive the expiration or termination of this Contract.

Section 11. Mediation/Arbitration Clause: If a dispute arises from or relates to this Agreement or the breach thereof and if the dispute cannot be resolved through direct discussions, the parties agree to endeavor first to settle the dispute in an amicable manner by mediation before a mutually agreed alternative dispute resolution entity or by mediation administered under the American Arbitration Association's Commercial or Construction Rules before resorting to arbitration. The mediator may be selected by agreement of the parties or through the American Arbitration Association. Following mediation, any unresolved controversy or claim arising from or relating to this Agreement or breach thereof shall be settled through binding arbitration which shall be conducted under mutually agreed rules, or under the American Arbitration Association's Commercial or Construction Arbitration Rules. The arbitrator may be selected by agreement of the Parties or through appointment pursuant to the rules of the American Arbitration Association. All fees and expenses for mediation or arbitration shall be borne by the Parties equally. However, each Party shall bear the expense of its own counsel, experts, witnesses, and preparation and presentation of evidence.

Section 12. Governing Law and Venue. This Agreement shall be governed by the laws of the State of Washington. Appropriate venue is King County.

Section 13. No Employment Relationship Created. The Parties agree that nothing in this Agreement shall be construed to create an employment relationship between the Association and any employee, agent, representative or contractor of the City, or between the City and any employee, agent, representative or contractor of the Association.

Section 14. No Third Party Rights. This Agreement is intended for the sole and exclusive benefit of the parties hereto and no third party rights are created by this Agreement.

Section 15. Notices. Notices to the City shall be sent to the following address:

**City of Des Moines
City Transportation Engineer
21650 11th Avenue So.
Des Moines, WA 98198**

Notices to the Association shall be sent to the following address:

**Redondo Heights Condominium Association
Association Vice-President
Sandy Dowell
28313 Redondo Way South, #104
Des Moines, WA 98198**



Section 16. Integration/Entire Agreement. This document constitutes the entire embodiment of the Agreement between the Parties, and, unless modified in writing by an amendment to this Agreement signed by the Parties hereto, shall be implemented as described above. This Agreement supersedes any oral representations that are inconsistent with or modify its terms and conditions.

Section 17. Non-Waiver. Waiver by any Party of any of the provisions contained within this Agreement, including but not limited to any performance deadline, shall not be construed as a waiver of any other provisions.

Section 18. Amendment. This Agreement may be amended only upon consent of all Parties hereto. Any amendment hereto shall be in writing and shall be ratified and executed by the Parties in the same manner in which it was originally adopted.

Section 19. Severability. If any provision of this Agreement shall be held invalid, the remainder of this agreement shall not be affected thereby.

Section 20. Counterparts. This Agreement shall be effective whether signed by all Parties on the same document or whether signed in counterparts.

Reviewed and approved as authorized by motion of the City of Des Moines City Council on the 17th day of May, 2012

CITY OF DES MOINES

By: [Signature]
Anthony A. Piascecki, City Manager
Date: 5/18/12

ATTEST:

[Signature]
City Clerk

APPROVED AS TO FORM:

[Signature]
Des Moines City Attorney

REDONDO HEIGHTS ASSOCIATION

By: [Signature]
Fred Gibbs, Association President
Date: 4/30/2012

REDONDO HEIGHTS SECRETARY TREAS.

[Signature] / RHC TREAS
Date: 4/30/2012