RESOLUTION CONFIRMING THE PROCEDURE FOR APPROVAL OF CONSTRUCTION CONTRACTS; CONTRACTS FOR ENGINEERING, ARCHITECTURAL, AND OTHER PROFESSIONAL SERVICES; AND CHANGE ORDERS AND AMENDMENTS

of the

METRO FLOOD DIVERSION AUTHORITY

Approved on _____, 2016

This instrument was drafted by:
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Member _____ introduced the following resolution and moved for its adoption:

RESOLUTION CONFIRMING THE PROCEDURE FOR APPROVAL OF CONSTRUCTION CONTRACTS; CONTRACTS FOR ENGINEERING, ARCHITECTURAL, AND OTHER PROFESSIONAL SERVICES; AND CHANGE ORDERS AND AMENDMENTS

WHEREAS, the City of Moorhead, the City of Fargo, Clay County, Cass County, and the Cass County Joint Water Resource District (the "Member Entities") entered into a Joint Powers Agreement ("JPA") on June 1, 2016, creating the Metro Flood Diversion Authority ("Diversion Authority").

WHEREAS, Article XII of the JPA contains the general procedures for bidding, contracting, and payment procedures for the Fargo-Moorhead Metropolitan Area Flood Risk Management Project (the "Project"); and

WHEREAS, the Member Entities recognize that the size and complexity of the Project requires the adoption of additional operating procedures regarding the bidding, contracting, and payment procedures for the Project; and

WHEREAS, the governing body of the Diversion Authority, the Diversion Authority Board ("Diversion Authority Board"), is authorized to adopt by written resolution specific written operating procedures regarding the bidding, contracting, and payment procedures for the Project in accordance with Section 12.05 of the JPA; and

WHEREAS, the Co-Executive Directors (or Executive Director, as applicable) are the chief purchasing agents of the Metro Flood Diversion Authority, and purchases and contracts are made by the Co-Executive Directors in accordance with procedures specified by the Diversion Authority Board; and

WHEREAS, in accordance with Section 14.06 of the JPA, the Co-Executive Directors may enter into a purchase or contract in an amount up to ten thousand dollars ($10,000) on behalf of the Metro Flood Diversion Authority without the approval of the Diversion Authority Board; and

WHEREAS, the Diversion Authority will follow Chapter 48-01.2 of the North Dakota Century Code regarding traditionally bid public improvement contracts.

NOW, THEREFORE, BE IT RESOLVED by the governing body of the Diversion Authority:

Section 1. **Applicability to Member Entities.** Pursuant to Article 12 of the JPA, if a portion of the Project is delegated to a Member Entity, that Member Entity is responsible for developing, approving, and making changes to contracts for that specific portion of the Project. In the event a portion of the Project is delegated to a Member Entity, that Member Entity shall follow the bidding and procurement requirements of the state in which the Member Entity is located, in

accordance with Section 12.09 of the JPA. This resolution shall only apply to contracts that are to be developed and approved by the Diversion Authority.

Section 2. Definitions.

All capitalized terms used and not otherwise defined herein shall have the meanings given them in this Resolution and as defined in this Section unless a different meaning clearly applies from the context.

"Addenda" means written or graphic instruments issued prior to the opening of Bids which clarify, correct, or change the Bidding Requirements or the proposed Contract Documents.

"Authority Work Directive" means a work directive given by the Diversion Authority to a Contractor or service provider.

"Best Efforts" means that a Co-Executive Director will act in Good Faith, in accordance with generally accepted commercial practices, and use reasonable due diligence to undertake all action contemplated by this Resolution, in accordance with applicable federal and state laws, regulations, and rules.

"Bid" means the offer of a Bidder submitted on the prescribed form setting forth the prices for the Work to be performed.

"Bidder" means an individual or entity that submits a Bid to the Owner.

"Bidding Documents" means the Bidding Requirements, the proposed Contract Documents, and all Addenda.

"Bidding Requirements" means the advertisement or invitation to bid, Instructions to Bidders, Bid Bond or other Bid security, if any, the Bid Form, and the Bid with any attachments.

"Change Order" means a document that is signed by the Contractor and Owner and authorizes an addition, deletion, or revision in the Work or an adjustment in the Contract Price or the Contract Times, or other revision to the Contract, issued on or after the Effective Date of the Contract.

"Change Proposal" means a written request by Contractor, duly submitted in compliance with the procedural requirements set forth herein, seeking an adjustment in Contract Price or Contract Times, or both; contesting an initial decision by Engineer concerning the requirements of the Contract Documents or the acceptability of Work under the Contract Documents; challenging a set-off against payments due; or seeking other relief with respect to the terms of the Contract.

"Contract" means the entire and integrated written contract between the Owner and Contractor concerning the Work.

"Contract Documents" means those items so designated in the Contract, which together comprise the Contract.

"Contract Price" means the money that Owner has agreed to pay Contractor for completion of the Work in accordance with the Contract Documents.

"Contract Times" means the number of days or the dates by which Contractor shall: (a) achieve Milestones, if any; (b) achieve Substantial Completion; and (c) complete the Work.

"Contractor" means the individual or entity with which the Owner has contracted for performance of the Work.

"Deputy Co-Executive Director" means a position of the Metro Flood Diversion Authority created by Section 14.03 of the JPA.

"Good Faith" means observance of reasonable commercial standards of fair dealing in a given trade of business.

"Member Entities" shall mean the City of Moorhead, the City of Fargo, Clay County, Cass County, and Cass County Joint Water Resource District. The term Member Entity does not include the City of West Fargo, Wilkin County, or Richland County.

"N.D.C.C." means the North Dakota Century Code.

"Owner" means the individual or entity with which the Contractor has contracted regarding the Work, and which has agreed to pay Contractor for the performance of the Work, pursuant to the terms of the Contract.

"P3 Procurement" means the procurement process being used to bid the Project Agreement for the construction of the Diversion Channel and Associated Infrastructure pursuant to Chapter 48-02.1 of the North Dakota Century Code.

"PMC" (Program Management Consultant) means an individual or firm responsible for planning and implementing the Project, which shall be under the direct supervision of the Executive Director, the Deputy Executive Director, and the Diversion Authority Board, and will consult with Member Entity staff.

"Project" means the LPP Flood Risk Management Features and the Recreation Features as generally described in the Final Feasibility Report and Environmental Impact Statement, Fargo-Moorhead Metropolitan Area Flood Risk Management Project, dated July 2011 and approved by the Chief of Engineers on December 19, 2011, as amended by the Supplemental Environmental Assessment, Fargo-Moorhead Metropolitan Area Flood Risk Management Project, dated September 2013 and approved by the District Engineer, St. Paul District on September 19, 2013.

"Work Change Directives" means a written directive to a Contractor that does not change the Contract Price or the Contract Times, but is evidence that the parties expect that the modification ordered or documented by a Work Change Directive will be incorporated into a subsequently issued Change Order.

Section 3. <u>Contract Negotiations</u>. The Co-Executive Directors are the chief purchasing agents for the Diversion Authority. The PMC and the General Counsel may assist the Co-Executive

Directors with the negotiation and development of Contracts and changes to Contracts as described below.

Section 4. Procedure for Diversion Authority Approval of Construction Contracts and Contracts for Engineering, Architectural, and Other Professional Services.

A. All Contracts relating to construction activities and related professional services of the Project shall identify the Diversion Authority as the Owner under the Contract, unless the Contract utilizes funds generated by special assessments levied and collected by the Cass County Joint Water Resource District ("CCJWRD"), in which case the Contract may be held in either name.

B. All Contracts for construction and related professional services presented to the Diversion Authority Board shall be approved at a public meeting and by either a resolution or a motion approved by the affirmative vote of a majority of the members of the Diversion Authority Board.

C. Any Contract presented to the Diversion Authority Board for approval will be approved upon a majority vote of all members of the Diversion Authority Board, in accordance with Section 5.09 of the JPA.

D. For construction Contracts in the amount of ten thousand dollars ($10,000) or less:

(1) The PMC and/or the Co-Executive Directors shall submit a proposed Contract to the Technical Advisory Group. The Technical Advisory Group shall review the Contract and submit its verbal recommendation to the Co-Executive Directors during its next regular meeting after receiving the Contract.

(2) Upon receiving a positive recommendation from the Technical Advisory Group, the Co-Executive Directors may approve the Contract. A Contract approved by the Co-Executive Directors must be signed by at least one (1) of the Co-Executive Directors on behalf of the Diversion Authority.

(3) Contracts utilizing funds generated by special assessments levied and collected by the CCJWRD shall also be approved by the CCJWRD, as required under N.D.C.C. § 61-16.1-24. Such Contracts shall first be approved by the CCJWRD Board, before being signed by the Co-Executive Directors.

E. For construction Contracts greater than ten thousand dollars ($10,000) and less than one hundred thousand dollars ($100,000):

(1) If the estimated cost for the proposed construction project is estimated to be greater than ten thousand dollars ($10,000) and less than one hundred thousand dollars ($100,000), the PMC and/or Co-Executive Directors shall use their Best Efforts to request and secure three (3) competitive quotes for the proposed construction work. In the event that the PMC and/or Co-Executive Directors determine that only one Contractor or supplier is capable of providing the construction work or materials, the PMC and/or the Co-Executive Directors shall provide such

recommendation to the Finance Committee. The Finance Committee shall review make a recommendation to the PMC and/or the Co-Executive Directors to dispense with the requirement to requirement to use their Best Efforts to request and secure three (3) competitive quotes.

(2) The PMC or the Co-Executive Directors shall submit a proposed Contract to the Technical Advisory Group. The Technical Advisory Group shall review the Contract during its next regular meeting after receiving the Contract and then provide its recommendations to the PMC or the Co-Executive Directors.

(3) The PMC or the Co-Executive Directors shall consolidate the recommendations of the Technical Advisory Group and the Co-Executive Directors regarding the proposed Contract into a single form and submit the written recommendation to the Finance Committee for review and/or approval. The recommendations of the Finance Committee regarding the proposed Contract shall then be submitted by the PMC or the Co-Executive Directors to the Diversion Authority Board for consideration.

(4) Contracts utilizing funds generated by special assessments levied and collected by the CCJWRD shall also be approved by the CCJWRD, as required under N.D.C.C. § 61-16.1-24. Such Contracts must first be approved by the CCJWRD Board prior to being submitted to the Diversion Authority Board for approval.

F. For construction Contracts in the amount of one hundred thousand dollars ($100,000) or more:

(1) If the estimated cost for the proposed construction project meets the public improvement construction threshold of one hundred thousand dollars ($100,000), as provided for in N.D.C.C. § 48-01.2-02.1, the PMC and/or the Engineer of Record shall advertise for Bids in accordance with North Dakota law and receive all Bids and/or proposals for the Contract.

(2) The PMC and/or the Engineer of Record shall open the Bids and/or proposals at a public meeting in accordance with N.D.C.C. § 48-01.2-07. The PMC and/or the Engineer of Record will review the Bid and/or proposal of the lowest responsible Bidder in accordance with N.D.C.C. § 48-01.2-07, and make a written recommendation to the Diversion Authority as to the sufficiency of the Bid and/or proposal. The PMC and/or the Engineer of Record shall also submit the Bid and/or proposal to the Finance Committee. Upon reviewing the Bid and/or proposal, the Finance Committee shall submit a written recommendation to the Diversion Authority Board. The Diversion Authority Board may then approve the Contract. The Engineer of Record and the Diversion Authority Board may reject all Bids and/or proposals, and the Diversion Authority may subsequently re-advertise for Bids if no Bids and/or proposals are satisfactory.

(3) Contracts utilizing funds generated by special assessments levied and collected by the CCJWRD shall also be approved by the CCJWRD Board, as required under

N.D.C.C. § 61-16.1-24. Such Contracts shall first be approved by the CCJWRD, before being presented to the Diversion Authority Board for approval.

G. Contracts for Engineering, Architectural, and Other Professional Services:

(1) The PMC and/or Co-Executive Directors shall submit a proposed Contract relating to engineering, architectural, and other professional services to the Finance Committee for review. The Finance Committee shall then submit its recommendation and the proposed Contract to the Diversion Authority Board for approval.

(2) A Contract for engineering, architectural, and other professional services does not require approval by the CCJWRD.

(3) The Diversion Authority Board, when it determines by affirmative vote or a majority of the Diversion Authority Board members that it is both reasonable and in the best interests of the Project, may deviate from the process outlined above for professional service agreements based upon the advice and recommendation from insurance providers, legal counsel, engineers, and/or the Co-Executive Directors.

H. Contracts for Services of the PMC:

(1) The Co-Executive Directors shall submit a Contract for the services of a PMC to the Finance Committee for recommendation. The Finance Committee shall then submit its recommendation and the proposed Contract to the Diversion Authority Board for approval.

Section 5. Procedure for Diversion Authority Approval of Changes and Amendments to Existing Contracts.

A. The Diversion Authority Board recognizes and acknowledges that, due to the size and complexity of the Project, situations will arise that require the Co-Executive Directors to authorize Change Orders prior to submitting a Change Order, Work Change Directive, and Authority Work Directive to the Diversion Authority pursuant to the procedure outlined in this section. The Co-Executive Directors will use their Best Efforts to secure Diversion Authority Board approval of all Change Orders, Work Change Directives and Authority Work Directives prior to work being commenced, however, the Diversion Authority Board hereby authorizes the Co-Executive Directors to authorize Change Orders, Work Change Directives and Authority Work Directives, without prior Diversion Authority Board approval, when public safety dictates that Contract actions need to be taken in order to stabilize worksites and/or mitigate costs to the public and/or the Diversion Authority. If the Co-Executive Directors act pursuant to the authority set forth in this section, they shall make a good faith effort to contact the Diversion Authority Board Chair and the Finance Committee Chair prior to authorizing a contractor to proceed. The Co-Executive Directors shall report such actions and/or decisions to the recommendation to the Finance Committee for review and then to the Diversion Authority Board for formal approval.

B. Any Change Orders, Work Change Directives and Authority Work Directives, or amendment to a master service agreement presented to the Diversion Authority Board will be approved upon a majority vote of all members of the Diversion Authority Board, in accordance with Section 5.09 of the JPA.

C. Change Orders to construction Contracts:

(1) Change Order requests to Diversion Authority construction Contracts shall state in detail the reason for the proposed change and all costs associated with the change. The PMC and/or the Engineer of Record shall be responsible for preparing the Change Order requests with an itemization and narrative explanation of each Change Order. The Fiscal Agent for the Diversion Authority shall provide the PMC and/or Engineer of Record with the requirements for submitting all Project costs.

(2) The PMC and/or the Engineer of Record shall submit a construction Change Order request to the Technical Advisory Group. The Technical Advisory Group shall review the Change Order request during its next regular meeting after receiving the Change Order request, and make a recommendation as to approval or denial of the Change Order request.

(3) The Technical Advisory Group shall submit the Change Order request and its recommendation to the Finance Committee. The Finance Committee will review the Change Order request at its next regular meeting, and submit the request, the Finance Committee's recommendation, and the Technical Advisory Group's recommendation to the Diversion Authority Board for approval. If a Contract with an estimated cost of more than one hundred thousand dollars ($100,000) utilizes funds generated by special assessments levied and collected by the CCJWRD, the CCJWRD Board must approve the Change Order before being approved by the Diversion Authority Board.

(4) A Change Order approved by the Diversion Authority Board may be approved in whole or in part.

(5) The Diversion Authority Board recognizes that time is of the essence in making Change Orders, and therefore, agrees to approve or deny requests for Change Orders during the next Diversion Authority Board meeting after submittal to the Technical Advisory Group.

D. Field orders under construction Contracts:

(1) Field orders to Diversion Authority Contracts not affecting the cost of the original Contract shall be prepared by the PMC and/or the Engineer of Record and shall state in detail the reason for the change. The PMC and/or the Engineer of Record shall submit a field order to the Technical Advisory Group.

(2) The Technical Advisory Group shall review the field order during its next regular meeting after receiving the field order, and make a recommendation to the Co-

Executive Directors as to approval or denial of the field order. The Co-Executive Directors may then approve and sign the field order.

E. Work Change Directives to construction Contracts:

(1) Work Change Directives to Diversion Authority construction Contracts shall be prepared by the PMC and/or the Engineer of Record and shall state in detail the reason for the change and, if applicable, the costs associated with the change. The PMC and/or the Engineer of Record shall be responsible for preparing the Work Change Directive with sufficient detail.

(2) The PMC and/or the Engineer of Record shall submit a construction Work Change Directive to the Technical Advisory Group. The Technical Advisory Group shall review the Work Change Directive during its next regular meeting after receiving the Work Change Directive, and make a recommendation to the Co-Executive Directors as to approval or denial of the Work Change Directive.

(3) If the Work Change Directive changes the schedule of the original Contract, each Co-Executive Director may approve and sign the Work Change Directive. If the original Contract utilizes funds generated by special assessments levied and collected by the CCJWRD, CCJWRD's engineer must approve the Work Change Directive before it is signed by the Co-Executive Directors.

(4) If the Work Change Directive changes the costs and/or amounts of the original Contract, the Co-Executive Directors shall submit the Work Change Directive and a recommendation to the Finance Committee, along with the recommendation given by the Technical Advisory Group. The Finance Committee will review the Work Change Directive at its next regular meeting, and submit the Work Change Directive and its recommendation to the Diversion Authority Board for approval. If the original Contract utilizes funds generated by special assessments levied and collected by the CCJWRD, the CCJWRD Board must approve the Work Change Directive before being approved by the Diversion Authority Board.

(5) The Diversion Authority Board recognizes that time is of the essence in making Work Change Directives, and therefore, agrees to approve or deny Work Change Directives during the next Diversion Authority Board meeting after submittal to the Co-Executive Directors.

F. New task orders and amendments to task orders under a master service agreement:

(1) New task orders under a master service agreement and amendments to existing task orders shall be prepared by the PMC and/or the Engineer of Record. The PMC and/or the Engineer of Record shall submit the new task order or amendment to a task order to the Co-Executive Directors.

(2) Upon review, each of the Co-Executive Directors may subsequently approve and sign the new task order or amendment to a task order on behalf of the Diversion Authority.

G. Amendments to master service agreements and Authority Work Directives:

(1) Amendments to existing master service agreements and Authority Work Directives shall be prepared by the PMC and/or the Engineer of Record. The PMC and/or the Engineer of Record shall submit an amendment to a master service agreement or Authority Work Directive to the Co-Executive Directors.

(2) The Co-Executive Directors shall submit the amendment to a master service agreement or Authority Work Directive along with a recommendation to the Finance Committee. The Finance Committee will review the amendment to a master service agreement or Authority Work Directive at its next regular meeting, and submit the amendment to a master service agreement or Authority Work Directive and the Finance Committee's recommendation to the Diversion Authority Board for approval.

Section 6. **Applicability of This Resolution.** This resolution will only apply to any traditionally bid Contract for construction and does not apply to the P3 Procurement for the Diversion Channel and Associated Infrastructure.

Section 7. **North Dakota Law Applies.** This Resolution will be controlled by the laws of the State of North Dakota.

Section 8. **Effective Date.** This Resolution will take effect immediately upon adoption.

Dated: _____, 2016.

METRO FLOOD DIVERSION AUTHORITY

APPROVED:

_____
Darrell Vanyo, Chair

ATTEST:

_____
Heather Worden, Secretary

The motion for adoption of the foregoing resolution was duly seconded by _____, and upon roll call vote, the following voted in favor thereof: _____. The following

were absent and not voting: _____. The following were absent and not voting: _____. The following voted against the same: _____ _____. A majority of the Members having voted aye, the resolution was declared duly passed and adopted.