North Dakota State Water Commission

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RECEIVED
CASS COUNTY COMMISSION
JUL 14 2016

July 8, 2016

Darrell Vanyo, Chairman
Metro Flood Diversion Authority
211 9th Street South
Fargo, ND 58108-2806

RE: Fargo Flood Control Project 2015-2017

Dear Mr. Vanyo:

The enclosed Agreement for Cost-Share Reimbursement Fargo Flood Control Project 2015-2017 is to provide a grant of $69,000,000 on actual eligible costs. Please sign, date, and make a copy of the agreement for your records before returning the original agreement to this office. The signed agreement is necessary to proceed with reimbursements to the Authority based on claim vouchers documenting the actual eligible costs. Prior to issuing reimbursements, provide a copy of the certificate of insurance and all endorsements to State Water Commission.

If you have any questions, please call me at 328-4952.

Sincerely,

Jeffrey Mattern, P.E.
Engineer Manager

JM:1928

JACK DALRYMPLE, GOVERNOR
CHAIRMAN

GARLAND ERBELE, P.E.
CHIEF ENGINEER-SECRETARY

SWC Project No. 1928
Project Manager: JMattern
July 2016

Agreement for Cost-Share Reimbursement
Fargo Flood Control Project 2015-2017

1. PARTIES. This agreement is between the State of North Dakota (State), by and through the State Water Commission (Commission), and Metro Flood Diversion Authority (Sponsor).

2. COMMISSION'S RESPONSIBILITY AND INTENT. Commission will provide Sponsor with cost-share, not to exceed $69,000,000, as authorized in section 8 of S.B. 2020, 2015 N.D. Leg., to reimburse actual eligible costs incurred in Sponsor's 2015-2017 Fargo Flood Control Project (Project), contingent on availability of funds and conditions of this agreement. Commission's intent in providing this funding to Sponsor is merely to help Sponsor financially afford Project. Sponsor retains sole and absolute discretion in the manner and means of carrying out Project, except to the extent specified in this agreement.

3. SPONSOR'S RESPONSIBILITIES. Sponsor must:

a. Complete Project.
b. Provide continued maintenance for Project.
c. Ensure all applicable permits (federal, state, and local) are obtained.
d. Acquire all title to land and easements for Project.
e. Comply with all North Dakota laws governing the requirements for competitive bids, advertising, and awarding of contracts for construction of Project.
f. Maintain a Project file containing relevant documents and correspondence generated during the course of Project. State is not responsible for maintaining a Project file.
g. Prior to signature, inform Commission and any other relevant party regarding Project of any errors, misinterpretations, changes, modifications, miscalculations, incorrect Project descriptions, or any other information stated herein that is inaccurate.

4. PROJECT DESCRIPTION AND LOCATION. This agreement includes cost share for costs directly associated with completion of Project, with the purpose to reduce the flood risk of communities and counties along the Red River.

5. ELIGIBLE COSTS. Commission has sole discretion to determine eligible costs and availability of Commission funds. Additional information is outlined in Commission's cost-share policy. The Sponsor may use the funds for land purchases and construction costs directly associated with completion of Project, including right-of-way acquisition costs, but funds may not be used for the purchase of dwellings. No more than ten percent of these funds may be used for engineering, legal, planning, or other similar purposes. Funds may not be used for general operations or administration costs. Costs incurred by non-state entities for dwellings or other real property which are not paid by state funds are eligible for application by non-state entity for cost-sharing with the Commission.

6. **PAYMENT.** Sponsor must submit to Commission periodic written requests for payment that must include an itemization of actual costs and approval, signed by an appropriate official from the city of Fargo, Cass County, and Cass County Joint Water Resource District. When funds are available, Commission will pay Sponsor 50 percent of the total eligible itemized costs in the requests for payment. Cost share on the acquisition of land will be provided at the time it is utilized for project construction or part of a final mitigation settlement. Cost share will be provided on the relocation costs of businesses or residents impacted by Project when final settlement agreement has been reached on relocation costs. A Commission representative may inspect Project to determine whether the work satisfies Commission's cost share requirements before Commission makes payment(s) to Sponsor. Request for final payment must include documents or record drawings of features constructed.

7. **INDEMNIFICATION.** Sponsor must require all subcontractors, other than state employed subcontractors, before commencement of an agreement between Sponsor and the subcontractor, to defend, indemnify, and hold harmless the State, from and against claims based on the vicarious liability of the State or its agents, but not against claims based on the State's negligence or intentional misconduct. The legal defense provided by subcontractor to the State under this provision must be free of any conflicts of interest, even if retention of separate legal counsel for the State is necessary. Subcontractor also agrees to defend, indemnify, and hold the State harmless for all costs, expenses, and attorneys' fees incurred if the State prevails in an action against subcontractor in establishing and litigating the indemnification coverage required herein. This obligation continues after the termination of this agreement.

8. **INSURANCE.** State and Sponsor each must secure and keep in force during the term of this agreement, from an insurance company, government self-insurance pool, or government self-retention fund authorized to do business in North Dakota, commercial general liability with minimum limits of liability of $250,000 per person and $500,000 per occurrence.

In addition, Sponsor must require all subcontractors, other than state employed subcontractors, before commencement of an agreement between Sponsor and the subcontractor, to secure and keep in force during the term of this agreement, from insurance companies authorized to do business in North Dakota, the following insurance coverages:

a. Commercial general liability, including premises or operations, contractual, and products or completed operations coverages (if applicable), with minimum liability limits of $250,000 per person and $1,000,000 per occurrence.
b. Automobile liability, including Owned (if any), Hired, and Non-owned automobiles, with minimum liability limits of $250,000 per person and $1,000,000 per occurrence.
c. Workers compensation coverage meeting all statutory requirements. The policy must provide coverage for all states of operation that apply to the performance of this contract.

d. If subcontractor is domiciled outside the State of North Dakota, employer's liability or "stop gap" insurance of not less than $1,000,000 as an endorsement on the workers compensation or commercial general liability insurance.

The insurance coverages listed above must meet the following additional requirements:

e. Any deductible or other similar obligation under the policies is the sole responsibility of the subcontractor. The amount of any deductible is subject to approval by the State.

f. This insurance may be in policy or policies of insurance, primary and excess, including the so-called umbrella or catastrophe form, and must be placed with insurers rated "A-" or better by A.M. Best Company, Inc., provided any excess policy follows form for coverage. Less than an "A-" rating must be approved by the State. The policies must be in form and terms approved by the State.

g. The duty to defend, indemnify, and hold harmless the State under this agreement is not limited by the insurance required in this agreement.

h. The State must be endorsed on the commercial general liability policy, including any excess policies, as additional insured. The State must have all the benefits, rights, and coverages of an additional insured under these policies that are not limited to the minimum limits of insurance required by this agreement or by the contractual indemnity obligations of Sponsor.

i. The insurance required in this agreement, through a policy or endorsement, must include:

(1) A "Waiver of Subrogation" waiving any right to recovery the insurance company may have against the State;

(2) A provision that subcontractor's insurance coverage is primary (i.e., pay first) as respects any insurance, self-insurance, or self-retention maintained by the State and that any insurance, self-insurance, or self-retention maintained by the State must be in excess of the subcontractor's insurance and must not contribute with it;

(3) Cross liability/severability of interest for all policies and endorsements:

(4) The legal defense provided to the State under the policy and any endorsements must be free of any conflicts of interest, even if retention of separate legal counsel for the State is necessary;

(5) The insolvency or bankruptcy of the insured subcontractor must not release the insurer from payment under the policy, even when such insolvency or bankruptcy prevents the insured subcontractor from meeting the retention limit under the policy.

j. The subcontractor must furnish a certificate of insurance to the Commission before commencement of this agreement. All endorsements must be provided as soon as practicable.

k. Failure to provide insurance as required in this agreement is a material breach of contract entitling the State to terminate this agreement immediately.

l. The subcontractor must provide at least 30 days' notice of any cancellation or material change to the policies or endorsements.

9. BREACH. Violation of any provision of this agreement by Sponsor constitutes breach of this agreement. A breach obligates Sponsor to reimburse Commission for all funds paid to Sponsor and relieves Commission of all obligations under this agreement.

10. AGREEMENT BECOMES VOID. This agreement is void if not signed and returned by Sponsor within 60 days of Commission's signature.

11. TERMINATION.

a. Commission may terminate this agreement effective upon delivery of written notice to Sponsor, or a later date as may be stated in the notice, under any of the following conditions:
   (1) If Commission determines an emergency exists.
   (2) If funding from federal, state, or other sources is not obtained and continued at levels sufficient to provide the funds necessary to comply with this agreement. The parties may modify this agreement to accommodate a reduction in funds.
   (3) If federal or state laws or rules are modified or interpreted in a way that the services are no longer allowable or appropriate for purchase under this agreement or are no longer eligible for the funding proposed for payments authorized by this agreement.
   (4) If any license, permit, or certificate required by law, rule, or this agreement is denied, revoked, suspended, or not renewed.
   (5) If Commission determines that continuing the agreement is no longer necessary or would not produce beneficial results commensurate with the further expenditure of public funds.

b. Any termination of this agreement is without prejudice to any obligations or liabilities of either party already accrued prior to termination.

c. The rights and remedies of any party provided in this agreement are not exclusive.

12. APPLICABLE LAW AND VENUE. This agreement is governed by and construed under the laws of the State of North Dakota. Any action to enforce this agreement must be adjudicated exclusively in the District Court of Burleigh County, North Dakota.

13. SEVERABILITY. If any term of this agreement is declared by a court having jurisdiction to be illegal or unenforceable, the validity of the remaining terms is unaffected, and if possible, the rights and obligations of the parties are to be construed and enforced as if the agreement did not contain that term.

14. SPOLIATION – PRESERVATION OF EVIDENCE. Sponsor agrees to promptly notify Commission of all potential claims that arise or result from this agreement. Sponsor must also take all reasonable steps to preserve all physical evidence and information that may be relevant to the circumstances surrounding a potential claim, while maintaining public safety, and grants to

Commission the opportunity to review and inspect the evidence, including the scene of an accident.

15. MERGER AND MODIFICATION. This agreement constitutes the entire agreement between the parties. There are no understandings, agreements, or representations, oral or written, not specified within this agreement. This agreement may not be modified, supplemented, or amended in any manner, except by written agreement signed by both parties.

NORTH DAKOTA STATE WATER COMMISSION
By: Garland Erbele
GARLAND ERBELE, P.E.
Chief Engineer and Secretary

Date: 7.8.2016

METRO FLOOD DIVERSION AUTHORITY
By: _____
DARRELL VANYO
Chair

Date: _____