

After Recording Return to:

Attn: Kevin Rogerson
City Attorney's Office
City of Mount Vernon
PO Box 809
910 Cleveland Avenue
Mount Vernon, WA 98273

THIS AGREEMENT is made and entered into this 10th day of October, 2018, by and between the **PUBLIC UTILITY DISTRICT NO. 1 OF SKAGIT COUNTY**, a Public Utility District of the State of Washington, (hereinafter referred to as the "PUD"); and the **CITY OF MOUNT VERNON**, a municipal corporation of the State of Washington, (hereinafter referred to as the "City"),

WHEREAS the City is in the process of constructing street and waterline improvements to the City of Mount Vernon's College Way street at, under and near the Interstate Five Exchange (hereinafter, the "City's Project"); and

WHEREAS, the City has through the Designer prepared and received bids for construction of the City's Project that includes bid Schedule "A" for street improvements hereinafter known as "Street Project", and bid Schedule "B" for waterline improvements hereafter known as "Water Project"; and

WHEREAS, the City Project award requires both the Water Project and Street Project to be awarded under one contract by the City; and

WHEREAS the PUD has planned for the upgrade and installation of waterline facilities within the City's Project; and

WHEREAS, the PUD owns and operates the public water system within the City; and

WHEREAS, the City and PUD recognize the efficiency of constructing the Water Project and Street Project under one contract known as the City's Project; and

WHEREAS, it is necessary for the City and the PUD to enter into an agreement setting forth the terms, conditions, and requirements under which the PUD may reimburse the City for water improvement; and

WHEREAS, supplemental to each parties' authority, RCW 39.34.080 authorizes a public agency to contract with another public agency to perform any governmental service, activity, or undertaking which each public agency is authorized to perform, provided that such contract shall be authorized by the governing body of each party to the contract; and

WHEREAS, RCW 39.34.010 permits local governmental units to make the most efficient use of their powers by enabling them to cooperate with other localities on a basis of mutual advantage; and

WHEREAS, the City desires to enter into a contract with the PUD under which the ownership of the water system improvements is transferred to the PUD and the City is reimbursed for the cost of the same water system improvements.

NOW, THEREFORE, in consideration of the mutual promises and obligations hereinafter set forth, the parties hereto agree as follows:

1. Award and Construction of City's Project.

Upon the City's award of the City's Project the PUD shall reimburse the City as set forth in the terms and conditions of this Agreement for the Water Project; provided however the City reserves the right to reject all bids without cause for the City's Project. City shall be Project Owner of the City's Project with respect to all contract documents and state law. The City's Project shall be bid and awarded pursuant to all state law requirements for a code city of the City's population. Upon award by the City, the City shall authorize and direct the Contractor to construct and install the Water Project consistent with Schedule B attached hereto.

2. Conflict of terms.

In the event of a conflict between the terms of this Agreement and the City's Project, the conflict shall be resolved in the following order, with the first named document taking precedence over subsequently named documents:

- A. This Agreement;
- B. The City's Project specifications and/or drawings
- C. Remaining Project Contract documents not specifically identified above.

In the event of a conflict, the parties shall meet and confer as soon as reasonably practicable to reconcile any inconsistencies or conflicts. In the event such conflicts cannot be resolved it is expected that the conflict will be resolved through Section 23 of this Agreement.

3. Project Management. The City (or its contractor) shall be the entity primarily responsible for construction management of the City's Project.

- A. Contractual Privity – Contractor. For the purposes of this Agreement, the City shall be deemed to be the sole entity in contractual privity with the Contractor for construction of the City's Project.

- B. Tort Claims. It is the intent of the parties that the Contractor and the Contractor's insurance policies shall fully indemnify the City from any claims or causes of action resulting in whole or in part from the Contractor's negligent or intentionally tortuous acts. The PUD agrees that it shall provide to the City within three (3) business days of receipt a copy of any notice of claim the PUD receives that implicates the City's Project.
4. Standards of Construction. Construction of the City's Project shall be in accordance with this Agreement and Schedule B which includes the approved plans and specifications for the Water Project improvements.
5. Inspection. The PUD or its agent shall inspect the Contractor's water pipe and appurtenance installation and testing work in accordance with the Water Project plans and specifications. In addition, the City will inspect the remainder of the Contractor's work on the City's Project to determine conformance with the City Project's plans and specifications. The PUD is hereby authorized to enter the job site to inspect the work performed by the Contractor on the Water Project; provided however, such entry shall be coordinated by the City with the Contractor and may be reasonably limited pursuant to the City's agreement with the Contractor. PUD shall be responsible and assume liability for its own wrongful and/or negligent acts or omissions or those of their elected officials, officers, agents, or employees to the fullest extent required by law, and further agree to save, indemnify, defend, and hold the City harmless from any such liability resulting from negligence in performing inspections.
- A. Rejection of Work. PUD inspectors shall have the authority to request rejection of defective material and/or work that is being done improperly. Such rejection shall be accomplished by providing written notice to the City's representative, describing in detail all discrepancies between the Water Project plans and specifications and the work performed by the Contractor on the Water Project pursuant to the Project Contract and all related documents, and also describing in detail, as appropriate, such actions as may be necessary to correct the defective work. Such notice shall be provided to the City within two (2) working days of observation of the defective work. The City's representative shall forward a copy thereof to the Contractor.
- B. Acceptance of Work. PUD inspectors shall not have authority to accept work, to accept materials, to issue instructions to the Contractor, or give advice contrary or inconsistent to the Water Project's plans and specifications.
6. Payments. Construction payment requests shall be submitted by the Contractor to the City. The City shall forward to the PUD the portion of the

payment request attributable to the Water Project including agreed upon changes within 30 days of receiving payment requests from the Contractor. PUD shall pay to the City payment requests for the Water Project portion of the City's Project, including change orders thereto, absent disapproval as set forth herein. The City shall not charge an administrative overhead fee for management of the Water Project; provided however, PUD shall reimburse the City for actual, direct costs incurred by the City for additional, outside engineering services related to the Water Project. In the event of conflict arising out of payment amounts or timeliness of payments the conflict shall be resolved in accordance with Section 23 of this Agreement.

- A. **Payment Approval.** The PUD shall approve the payment request. In the event of disapproval, the PUD shall provide written notice to the City of the amount approved together with a description of the amounts disapproved and the reasons for such disapproval, within five (5) working days of receipt of the pay request from the City. The PUD shall reimburse the City the gross amount of the approved payment request within twenty five (25) working days of receipt of the pay request from the City.
 - B. **Failure to Make Timely Payment.** The PUD shall indemnify, defend, and hold harmless the City, its officials, officers, agents, employees, and volunteers from any and all claims, demands, damages, lawsuits, liabilities, losses, liens, expenses and costs by the City's Contractor arising out of any failure by the PUD to make progress payments of undisputed amounts. This provision shall apply to interest expenses paid by the City.
 - C. **Final Payment.** Final Payment for the Water Project, including the release of any retainage held by the City, shall be made by the City after receipt from the PUD of written authorization to make such final payment, transfer of the Water Project ownership to the PUD through appropriate lawful conveyance of the improvements, and acceptance of the PUD Project which shall not be unreasonably withheld. Such written authorization and acceptance, or a written explanation of denial thereof, shall be promptly provided upon request by the PUD. In the event of denial of written authorization and acceptance, the PUD agrees that it shall indemnify, defend, and hold the City harmless from any claims, demands, or lawsuits brought by the Contractor alleging damages resulting from such denial.
7. **Changes to the Work.** If the City or PUD determines it necessary to consider a change in the work the party proposing the change will seek the lowest cost alternative resulting in an equivalent Project through changes to the Street Project and/or Water Project and pay for all change

order costs including engineering fees, provided however; continuing disputes will be resolved through Section 23 of this Agreement.

8. Ownership of the Improvements. Improvements as a result of the Water Project ("PUD Improvements") upon transfer shall be exclusively owned by the PUD which shall have the sole obligation to maintain the PUD Improvements. The City shall, upon request, execute any reasonable document establishing the PUD's ownership of the PUD Improvements. Any third-party warranties attaching, and/or claims related, to the PUD Improvements are hereby assigned to the PUD. A party shall, upon request, cooperate with the other party to document such assignment and/or to pursue a claim or warranty claim against a third party.
9. Shared Duties- Exchange of Material Information. Each party shall keep the other party reasonably informed as to material facts concerning the design and construction of the Project contemplated by this Agreement and the payment therefor. The parties shall communicate by such means as is reasonably prudent, except where written notices are required as set forth in this Agreement. Written notices shall be provided by hard copy, either by personal delivery, postal mail, facsimile or by e-mail. The parties shall establish a reasonable schedule for regular communications during the course of the administration of this Agreement. The parties shall agree upon the form and content of information required to be exchanged hereby.
10. Right to Review: This contract is subject to review by the State auditor's office. Each party, or the party's designee, shall have the right to review and monitor the financial components of this project. Such review may include, but is not limited to, on-site inspection by agents or employees, inspection of all records or other materials. Each party shall preserve and maintain all financial records and records relating to this project under this Agreement for 3 years after contract termination, and shall make them available for such review, within Skagit County, State of Washington, upon request.
11. Contractual Relationships. This Agreement does not establish that a party may act as the agent or legal representative of the other for any purpose whatsoever. Neither party is granted any express or implied right or authority to assume or create any obligation or responsibility on behalf the other in the name of the other or to bind the other in any manner or thing whatsoever.
12. Notice of Claims. In the event a claim should be brought or an action filed with respect to the subject matter of this agreement, the parties agree that each party shall give endeavor to provide written notice to the other party of any act or occurrence that the party reasonably believes may lead to a claim or demand, that may be subject to the indemnity or shared defense provisions of this agreement.

13. Mutual Indemnity.

- A. The City shall indemnify and hold the PUD and its agents, employees, and/or officers, harmless from and shall process and defend at its own expense any and all claims, demands, suits, at law or equity, actions, penalties, losses, damages, or costs, of whatsoever kind or nature, brought against the PUD arising out of, in connection with, or incident to the execution of this Agreement and/or the City's negligent performance or negligent failure to perform this Agreement.
- B. The PUD shall indemnify and hold the City and its agents, employees, and/or officers, harmless from and shall process and defend at its own expense any and all claims, demands, suits, at law or equity, actions, penalties, losses, damages, or costs, of whatsoever kind or nature, brought against the City arising out of, in connection with, or incident to the execution of this Agreement and/or the PUD's negligent performance or negligent failure to perform any aspect of this Agreement.
- C. If such claims are caused by or result from the concurrent negligence of the parties, or their agents, employees, and/or officers, then these indemnity provisions shall be valid and enforceable only to the extent of the negligence of the indemnifying party; provided that nothing herein shall require either party to hold harmless or defend the other party or the other party's agents, employees and/or officers from any claims arising from the sole negligence of the other party, or its agents, employees, and/or officers.
- D. Each party specifically assumes potential liability for actions brought by that party's own employees against the other party and, solely for the purpose of this indemnification and defense; the parties specifically waive any immunity under the State Industrial Insurance Law, RCW 51. THE PARTIES RECOGNIZES THAT THIS WAIVER WAS SPECIFICALLY ENTERED INTO PURSUANT TO THE PROVISIONS OF RCW 4.24.115 AND WAS THE SUBJECT OF MUTUAL NEGOTIATION.

14. Termination.

- A. **Termination Before the Start of Construction.** The PUD may terminate this Agreement prior to the commencement of construction of the Water Project, by giving ten (10) days' notice to the City in writing. In the event of termination by the PUD, all costs of issuing a change order to delete the Water Project from the

Project, including costs attributable to the Contractor's overhead and profit, shall be borne by the PUD.

B. **Termination After the Start of Construction.** Either party may terminate this Agreement after the commencement of construction of the Project, by giving ninety (90) days' notice to the other party in writing. In the event of termination by the PUD, all costs of issuing a change order to delete the Water Project from the Project, including costs attributable to the Contractor's overhead and profit, shall be borne by the PUD and completed Water Project work shall become the property of the PUD. In the event of termination by the City, all costs of issuing a change order to delete the Water Project, including costs attributable to the Contractor's overhead and profit, shall be borne by the City including costs to reimburse the PUD for progress payments toward the completion of the Water Project.

15. **Duration.** The term of this Agreement shall commence upon mutual acceptance by the parties and the City's acceptance of a bid and award for the Project as set forth in Section One. The Agreement shall terminate when the City's Project, including the Water Project is complete, final acceptance has been made, all expenses have been paid and any disputes resolved; *provided*, that the parties accrued rights and obligations at the time of termination as established herein are reserved and shall survive termination.

16. **Administration:** The following individuals are designated as representatives of the respective parties. The representatives shall be responsible for administration of this Agreement and for coordinating and monitoring performance under this Agreement. In the event such representatives are changed, the party making the change shall notify the other party:

The PUD's representative shall be the Mark Handzlik, Engineering Manager

The City's representative shall be Mikael Love, Assistant Public Works Director.

17. **Notices.** All notices provided for in this Agreement shall be in writing, addressed to the appropriate party and its designated representative at the respective address set forth below or to such other address or representative as is specified by notice.

CITY: CITY OF Mount Vernon
Attn: Mikael Love
1024 Cleveland Avenue
Mount Vernon, WA 98273

PUD: PUD #1 of Skagit County
1415 Freeway Drive
P.O. Box 1436
Mount Vernon, WA 98273

18. Assignment. Neither party shall assign or transfer any obligation, interest, or claim under this Agreement without the prior written consent of the other party.
19. Interpretation and Venue. Washington law shall govern the interpretation of this Agreement. Skagit County shall be the venue of any arbitration or lawsuit arising out of this Agreement.
20. Unenforceability. If one or more of the clauses of this Agreement is found to be unenforceable, illegal, or contrary to public policy, the Agreement will remain in full force and effect except for the clauses that are unenforceable, illegal, or contrary to public policy.
21. Force Majeure. If either party is rendered unable, wholly or in part, by force majeure or any other cause of any kind not reasonably within its control to perform or comply with any obligation or condition of this Agreement upon giving written notice to the other party, such obligation or condition shall be suspended during the continuance of the inability so caused and such party shall be relieved of any liability during such period. The term force majeure shall include, without limitation by the following enumeration, acts of God, federal, state, county, or municipal orders, regulations or directives of any governmental authority or persons purporting to act therefor, or when the supply of product or any facility of production, manufacture/storage, transportation, distribution or delivery contemplated by either party is prevented or delayed by terrorist or enemy attack, riots, other disturbances, earthquakes, hurricanes, strikes, or lockouts of any class of workmen, or stoppage of labor, or damage to piers or essential equipment, floods, fire, explosion, or destruction from any cause of any character either similar or dissimilar to the foregoing and reasonably beyond the control of the party failing to perform
22. Signing/Recording. This Agreement may be executed in counterparts and may be recorded with the Skagit County Auditor.
23. Dispute Resolution. In the event of a dispute between the City and the PUD regarding Conflict of Terms, Payments, Changes to the Work, and the rights, duties, or liabilities of the parties under this Agreement, or the

delivery of services under this Agreement, it is expected that any conflicts arising out of the implementation of this Agreement will be resolved at the staff level. In the event that issues cannot be resolved by staff in a timely fashion, the parties agree to elevate the dispute through equivalent management levels of each party, and if necessary to the General Manager and City Mayor.

In the event that a dispute cannot be resolved in the manner described above, they shall be determined by a Dispute Board in the following manner: Each party to this Agreement shall appoint one member to the Dispute Board. The members so appointed shall jointly appoint an additional member to the Dispute Board. The Dispute Board shall review the facts, contract terms and applicable statutes and rules and make a determination of the dispute. The determination of the Dispute Board shall be final and binding on the parties hereto.

- 24. Complete Agreement. This Agreement constitutes the complete and final agreement of the parties and replaces and supersedes all oral and/or written proposals and agreements heretofore made on the subject matter and may be modified only by a writing signed by both parties.
- 25. Captions. The captions in this Agreement are for convenience only and do not in any way limit or amplify the provisions of this Agreement.

IN WITNESS WHEREOF the parties hereto have executed this Agreement as of the day and year first above written.

CITY OF MOUNT VERNON


PUBLIC UTILITY DISTRICT NO. 1

By:  _____
Mayor

By:  _____
General Manager

Approved as to form:

Approved as to form:

 _____
City Attorney

 _____
Public Utility District Attorney

 _____
Finance Director