

CONSTRUCTION AGREEMENT

CITY OF DULUTH

EAST HIGH SCHOOL

ROAD IMPROVEMENT PROJECT

INDEPENDENT SCHOOL DISTRICT No. 709.

THIS CONSTRUCTION AGREEMENT, entered on the ____ day of _____, 2011, by and between the CITY OF DULUTH, a municipal corporation created and existing under laws of the State of Minnesota, hereinafter referred to as "City", and INDEPENDENT SCHOOL DISTRICT NO. 709, an independent school district under the laws of the State of Minnesota, hereinafter referred to as "District".

WHEREAS, as part of its plan for reorganizing, reconstructing and revitalizing the its public school infrastructure, District has determined that it is needful and appropriate to redesign, reconstruct and add to the property previously known as the Ordean Middle School property and building and to convert it to the new East High School; and

WHEREAS, in order to effectively and safely use said property for said purposes, modifications related to access and traffic control, including traffic signals and turn lanes on East Superior Street and other work described herein will be necessary; and

WHEREAS, District is willing and able to undertake the construction and

installation of said signals and turn lanes under the terms and conditions of this Agreement.

NOW, THEREFORE, in consideration of the foregoing and the mutual covenants and agreements hereinafter contained, the parties covenant and agree for themselves and their successors and assigns as follows:

ARTICLE I
DEFINITIONS

For the purposes of this Agreement, the following terms shall have the meanings hereinafter ascribed to them unless a different meaning clearly appears from the context;

- A. City: shall mean the City of Duluth, Minnesota.
- B. Engineer: shall mean the City's City Engineer or the person designated to act on behalf of him/her with regard to this Agreement.
- C. Project: shall mean the design and contraction of new traffic signals and turn lanes at 40th Avenue East and Superior Street, new sidewalks along the south side of Superior Street and the west side of 40th Avenue East, work in the right of way and easements on the east side of 40th Avenue East and the south side of Luverne Street related to the new parking lot to be located east of 40th Avenue East and south of Luverne Street, turn lanes for the intersection located on East Superior Street approximately 550 feet west of 40th Avenue East and along 40th Avenue East south of Superior Street and retaining walls related to the foregoing improvements, all as generally shown on Exhibit A attached hereto and made a part hereof.
- D. Right-of-way or ROW: shall mean those portions of the rights of way of East Superior Street lying north of that parcel bearing the Parcel Code No. Plat 2680, Parcel 00510 in the office of the St. Louis County Auditor for St. Louis County, Minnesota and that portion of the right-of-way of 40th Avenue East as platted in LONDON ADDITION TO DULUTH, on file and of record in the office of the County Recorder for St. Louis County, Minnesota, which lies between platted Superior Street and platted London Road.

ARTICLE II
USE OF ROW

During the term of this Agreement, City grants to District the right to use those portions of ROW necessary for the construction of the Project in accordance with the Plans therefore as described in Article V below and the terms and conditions of this Agreement. In addition to this Agreement, District or its contractors on its behalf shall

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be required to obtain all permits, licenses and insurance related thereto not otherwise required by this Agreement ordinarily and customarily required for the construction of work such as the Project in City Rights-of-Way.

ARTICLE III

Conditions Precedent to Construction of the Project

Prior to the commencement of the construction of the Project, District shall have presented the following documentation to City with regard to the Project and shall have received the Engineer's prior approval thereof in writing as hereinafter required:

A. Construction Plans

Approved plans, specifications and elevations for the construction of the Project as described above and in Article IV below which conform to the most current edition of the Engineering Guidelines for Professional Engineering Services and Developments as approved by the City Engineer and on file in the office of the City Engineer. All construction of the public improvements will be inspected on a full time basis by the engineering consultant. The District shall require by contract that its engineering consultant deem the City Engineer and the City to have the status of a "client" of such consultant for purposes of the work performed by such consultant related to the Project, and particularly as such status reflects on the consultant's duties to provide accurate and timely information and reports to their clients on the progress of such work and problems related thereto, all in accordance with professional standards common to the profession within the area. It is currently understood by both parties that Architectural Resources, Inc. will serve as the District's engineering consultant for the design and construction of the Project.

B. Construction Contract

A copy of an executed contract between District and any and all contractors, if any, providing services in connection with the construction of the Project, certified by District to be a true and correct copy thereof.

C. Construction Bonds

Copies of executed payment bonds and performance bonds provided by any contractor described in Paragraph B above in connection with the construction of the Project, which bonds shall be in the penal amount of not less than one hundred (100%) percent of the contract price under the aforesaid construction contract written by a bonding company or bonding companies licensed to do business in the State of Minnesota, certified by District to be true and correct copies thereof which name the City as an additional beneficiary thereof.

ARTICLE IV

Project Plans

A. Plans, Specifications and Elevations

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No less than thirty (30) days prior to the commencement of construction of the Project or any portion thereof, or such lesser time as approved by the Engineer, District shall submit working drawings, specifications and elevations for the Project together with detailed site, grading, utility and landscaping plans and elevations, as the Engineer reasonably deems necessary, to the Engineer for approval except as hereinafter provided for. All such plans, specifications and elevations shall be in conformity with this Agreement, with the general project plans, with the City Engineer's design standards for road construction in the City and with all applicable laws, ordinances, rules, regulations and requirements of the City, State of Minnesota and United States of America Authorities. If the Engineer rejects such plans, specifications and elevation in whole or in part as not being in compliance with the foregoing requirements, and upon notification to District of said rejection together with the reason or reasons therefore, District shall submit new or corrected plans, specifications and elevations meeting said objections within thirty (30) days of said notice. The provisions of this Subparagraph relating to approval, rejection and resubmission of corrected plans hereinabove provided for with respect to the originally submitted plans, specifications and elevations shall continue to apply until said plans, specifications and elevations have been approved by the Engineer. The Engineer's acceptance of District's plans, specifications and elevations shall not constitute a waiver of Project code or ordinance or other developmental duties imposed in the future upon District by law. District expressly agrees to be solely responsible for all costs, including engineering fees connected with said plans, specification and elevations and any revisions thereto.

B. Changes After Initial Approval

Any changes made to plans by District after initial approval of the Engineer deemed to be material or substantial shall be submitted to him or her for acceptance in the same manner provided for in Paragraph A above.

ARTICLE V
Construction

A. Construction of Project

Upon approval of the Plans for the Project in accordance with Article IV above, District shall promptly commence construction of the Project in conformance with said plans. Construction of the Project as herein defined shall be completed on or before October 1, 2011 except as hereinafter set forth in this Agreement.

C. District to Bear All Costs of Project

Subject to the terms and conditions of this Agreement, District specifically guarantees and agrees to bear all costs related to the development and construction of the Project and any modifications thereto.

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D. Progress Reports

Until construction of the Project has been completed, District shall make reports in such detail and at such times as may reasonably be requested by City as to the actual progress of construction with respect to each such Project.

E. Completion Documents

Upon completion of construction and prior to the issuance of the Certificate of Completion as provided for in Paragraph F. below, District shall have provided to City Record Drawings conforming the standards of the City Engineer for all component parts of the Project along with certificates evidencing test results on all materials used in construction of the Project. In addition, District shall have dedicated such right-of-way easements as are deemed by the City Engineer to be reasonably necessary for the maintenance, operation, repair and replacement of all components of the Project in a form satisfactory to the City's City Attorney.

F. Certificate of Completion

Promptly upon completion by District, in accordance with this Agreement, of the construction of the Project, City shall furnish to District an appropriate certificate so certifying. No such certification shall be issued until all elements of the Project have been completed. Such certification by City shall constitute a conclusive determination of satisfaction of construction obligations of District undertaken pursuant to this Agreement.

G. Future Traffic Signals

It is anticipated that at some point in the future the District may wish to install traffic signals on Superior Street adjacent to the turn lanes constructed west of 40th Avenue East as part of the Project. The construction and installation of such traffic signals shall be subject to a separate agreement between the City and the District.

ARTICLE VI

TERM

The Term of this Agreement shall be deemed to have commenced on the date first above shown and shall run as long as any of the elements of the Project continue to exist in substantially their as-constructed condition or unless sooner terminated as herein provided for.

VII

MAINTENANCE

It is understood that upon issuance of the Certificate of Completion provided for in Paragraph F of Article V above, City will be responsible to maintain those portions of the Project consisting of the new traffic signals installed at 40th Avenue East and Superior Street and the new turn lanes along Superior Street. District will be solely responsible to maintain all other elements of the Project including but not limited to snow removal from all sidewalks and maintenance of retaining walls.

ARTICLE VIII
PROVISION AGAINST LIENS

The District shall not create or permit any mortgage, encumbrance or lien or allow any mechanics' or materialmen's liens to be filed or established or to remain against the ROW, or any part thereof.

ARTICLE IX
INDEMNIFICATION

District will to the fullest extent permitted by law, protect, indemnify and save City and its officers, agents, servants, employees and any person who controls City within the meaning of Securities Act of 1933, harmless from and against all liabilities, losses, damages, costs, expenses, including attorneys' fees and expenses, causes of action, suits, claims demands and judgements of any nature arising from:

- A. Any injury to or death of any person or damage to ROW in or upon the ROW, or growing out of or in connection with the use or non-use, condition or occupancy of the ROW or any part thereof by District or any officer, agent, servant, employee, contractor or person acting under the control of or for the benefit of District and also, without limitation, any and all acts or operations related to the construction on any portion of the Project except any such liability arising solely from the active negligence or intentional acts of City or its agents. The foregoing indemnification shall not be limited in any way by any limitation on the amount or type of damage, compensation or benefits payable by or for the District, customers, suppliers or affiliated organizations under any Workers' Compensation Act, Disability Benefit Acts or any other Employee Benefit Acts;
- B. Any violation by District of any provision of this Agreement;
- C. Any violation of any contract, agreement or restriction related to District's use of the ROW which shall have existed at the commencement of the Term of this Agreement or shall have been approved by the District; and
- D. Any violation of any law, ordinance, court order or regulation affecting the ROW or the Project or the ownership, occupancy or use thereof.

Promptly after receipt by District of notice of the commencement of any action with respect to which the District is required to indemnify such person under this Article, City shall notify the District in writing of the commencement thereof, and, subject to the provisions as hereinafter stated, the District shall assume the defense of such action, including the employment of counsel satisfactory to the indemnitee and the payment of expenses. In so far as such action shall relate to any alleged liability of the City with respect to which indemnity may be sought against the District, City shall have the right

to employ separate counsel in any such action and to participate in the defense thereof, and the fees and expenses of such separate counsel shall be at the expense of the District.

**ARTICLE X
INSURANCE**

Prior to the commencement of construction, District shall procure and continuously maintain insurance covering all risks of injury to or death of persons or damage to ROW arising in any way out of or as a result of District's occupancy of or use of the ROW, carried in the names of the District, any subtenant and the City as their respective interests may appear, as follows:

A. Property Insurance

The ROW and the Project, including all fixtures, equipment and machinery, shall be insured to the full replacement value thereof against all risk of Direct Physical Loss, except that such insurance may provide for a deductible amount not to exceed One Thousand and No/100 Dollars (\$1,000.00) per occurrence. For the purposes hereof, "all risk" means insurance equivalent in scope to protect against all risks of direct physical loss ordinarily insured against in the region. District hereby waives any and all claims or causes of action against City for damages caused by an insured peril hereunder, except such rights hereinafter set forth to an interest in the insurance proceeds payable in the event of such loss. In time of war in which the United States of America is a belligerent, the District will procure and maintain continuously in effect such insurance as may be available from the United States of America to the extent of the full replacement value of the Project and insuring against loss thereof or damage thereto from the risks and hazards of war, provided that the cost of such insurance is economically reasonable.

B. Liability Insurance

The District shall procure and maintain continuously in force Public Liability Insurance written on an "occurrence" basis under a Comprehensive General Liability Form in limits of not less than One Million Five Hundred Thousand and No/100s (\$1,500,000.00) Dollars aggregate per occurrence for personal bodily injury and death, and limits of One Million Five Hundred Thousand and No/100s (\$1,500,000.00) Dollars for ROW damage liability. If person limits are specified, they shall be for not less than One Million Five Hundred Thousand and No/100s (\$1,500,000.00) Dollars per person and be for the same coverages. The City shall be named as an additional insured therein. Insurance shall cover:

1. Public liability, including ROW and operations coverage.
2. Independent contractors--protective contingent liability.
3. Personal injury.

4. Owned, non-owned and hired vehicles.
 5. Contractual liability covering the indemnity obligations set forth herein.
 6. Products--completed operations.
 - 7, Blasting insurance if construction work will include use of explosives.
 8. Professional Liability Insurance provided by District's design professionals in an amount not less than **\$1,500,000** Single Limit; provided further that in the event the professional malpractice insurance is in the form of "claims made," insurance, 60 days notice prior to any cancellation or modification shall be required; and in such event, District will require its design professionals to provide the City with either evidence of new insurance coverage conforming to the provisions of this paragraph which will provide unbroken protection to the City, or, in the alternative, to purchase at its cost, extended coverage under the old policy for the period the state of repose runs; the protection to be provided by said "claims made" insurance shall remain in place until the running of the statute of repose for claims related to this Agreement.
- C. Workers' Compensation
Workers' Compensation Coverage if and as required by Minnesota law in statutory amounts with "all states" endorsement. Employees liability insurance shall be carried in limits of One Hundred Thousand and No/100 (\$100,000.00) Dollars per employee.
- D. Requirements for All Insurance
All insurance required in this Article X shall be taken out and maintained in responsible insurance companies organized under the laws of the states of the United States and licensed to do business in the State of Minnesota.
- E. Certifications
The District shall be required to supply to the City written certifications of insurance as required by the City requiring the insurer to give the City thirty (30) days' written notice prior to cancellation or modification of said insurance. In the event that an "accord" form of certification is used, the words, "endeavor to" shall be stricken from the notification provisions thereof.

ARTICLE XI
DEFAULTS AND REMEDIES THEREFORE

- A. General District Defaults and Remedies
1. General Events of Default
The following shall be deemed to be general events of default by District under the terms and conditions of this Agreement to which the remedies set forth in Subparagraph 2 below shall be applicable as otherwise set forth in this

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Agreement.

- a. District shall fail to observe or perform any of the other terms, conditions, covenants or agreements required to be observed or performed by it or any successors or assigns of District pursuant to this Agreement and such failure shall continue for a period of thirty (30) calendar days after City has, pursuant to the provisions of this Agreement, given written notice to District of such default or, in the event that such default shall be incapable of cure during said thirty (30) day period, shall have failed to commence to cure said default within thirty (30) days of the date of said notice and to diligently pursue the same to completion.
- b. District shall permit any liens on the ROW.
- c. District makes an assignment for the benefit of its creditors or admits in writing its inability to pay its debts as they become due; or an adjudication of bankruptcy or insolvency as made as to District or its business; or District files a petition of bankruptcy or files a petition seeking any reorganization, dissolution, liquidation, or rearrangement, composition, readjustment or similarly under any present or future bankruptcy or insolvency statute, law or regulation; or District files an answer admitting to or not contesting to the material allegations of a petition filed against in such proceeding or fails to have dismissed or vacated within thirty (30) days after its filing such a petition or seeks or consents or acquiesces in the appointment of any trustee, receiver or liquidator of a material part of District's properties or fails to have dismissed or vacated within thirty (30) days after the appointment without the consent or acquiescence of District of any trustee, receiver or liquidator of any material part of District's properties.

2. General Remedies

Except as otherwise set forth in this Agreement, City shall have the following remedies in the event of a default by District:

- a. Terminate this Agreement and, at its discretion, retake the ROW from District.
- b. Cause construction of the Project to be completed and collect from District or its bond the costs thereof, including costs of collection.
- c. Seek and be entitled to monetary damages, including consequential damages from District for any damages, including consequential damages incurred by City as a result of District's default.
- d. Seek and be entitled to injunctive or declaratory relief as is necessary to prevent District's violation of the terms and conditions

of this Agreement or to compel District's performance of its obligations hereunder.

- e. Seek such other legal or equitable relief as a court of competent jurisdiction may determine is available to City.

B. Non-Waiver

The waiver by City of any default on the part of District or the failure of City to declare default on the part of District of any of its obligations pursuant to this Agreement shall not be deemed to be a waiver of any subsequent event of default on the part of District of the same or of any other obligation of District hereunder. And, to be effective, any waiver of any default by District hereunder shall be in writing by City.

C. Remedies Cumulative

Except as specifically set forth herein, the remedies provided under this Agreement shall be deemed to be cumulative and non-exclusive and the election of one remedy shall not be deemed to be the waiver of any other remedy with regard to any occasion of default hereunder.

D. Attorneys' Fees

In the event that either party is in default of any of the terms and conditions of this Agreement and the non-defaulting party shall successfully take legal action to enforce said rights herein, in addition to the foregoing, such non-defaulting party shall be entitled to reimbursement for its reasonable attorneys' fees and costs and otherwise for its costs and disbursements occasioned in enforcing its rights hereunder.

ARTICLE XII
FORCE MAJEURE

Under the terms of this Agreement, neither the City nor District shall be considered in default or in breach of any of the terms with respect to the performance of their respective obligations under this Agreement in the event of enforced delay in the performance of its obligations due to unforeseeable causes beyond its control and without its fault or negligence, including but not limited to acts of God, acts of a public enemy, acts of the federal government, acts of another party, fire, floods, epidemics, strikes or embargoes, or for delays of contractors or subcontractors due to such causes. In the event of any such delay, any time for completion or delivery under this Agreement shall be extended for the period of any such delay upon written notice from the party seeking the extension to the other party.

ARTICLE XIII
REPRESENTATIONS BY CITY

City represents and warrants that as of the date hereof:

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- A. It is a lawfully constituted municipal corporation under the laws of the State of Minnesota, it is not a material violation of any provisions of State law and that it has full power and authority to enter into this Agreement and perform its obligations hereunder.
- B. There are no actions, suits or proceedings pending, or to the knowledge of City, threatened against City or any ROW of City in any court or before any Federal, State, municipal or governmental agency which, if decided adversely to City, would have a material adverse effect upon City or any business or ROW of City and City is not in default with respect to any order of any court or government agency.
- C. City has investigated and has no knowledge that a City Council Member or other member, official, or employee of City is directly or indirectly financially interested in this Agreement or in any transactions concluded in connection with this Agreement.
- D. City shall do such things as are necessary to cause any information, document, certificate, statement in writing, or report required under this Agreement or otherwise delivered to any third parties under this Agreement to be true, correct and complete in all material respects.

ARTICLE XIV
DISTRICT'S REPRESENTATIONS AND WARRANTIES

District represents and warrants that as of the date hereof:

- A. District is An independent school district under the laws of the State of Minnesota, is not in material violation of any provisions of State law and has full power and authority to enter into this Agreement and to perform its obligations hereunder.
- B. That District is fully competent to construct the Project on the ROW under all laws, rulings, regulations and ordinances of any governmental authority having jurisdiction and that it agrees to comply with all applicable State and Federal wages and hours laws, including Davis-Bacon and local versions thereof or similar laws at its own expense.
- C. That there are no actions, suits or proceedings pending or, to the knowledge of District, threatened against District or any ROW or District in any court or before any Federal, State or municipal or other governmental agency which, if decided adversely to District, could have a material adverse affect upon District or the ROW, and that District is not in default of any order of any court or governmental agency.
- D. It is not in default of the payment of principal of or interest on any indebtedness for borrowed money or in default under any instrument or agreement pursuant to which the indebtedness has been incurred.
- E. District shall do such things as are necessary to cause any information,

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