



**DIVERSION AUTHORITY  
Land Management Committee  
City Commission Room  
Fargo City Hall  
Wednesday, December 20, 2017  
9:00 a.m.**

1. Agenda Review
2. Approve October 25, 2017 Minutes (**item A**)
3. Governors' Task Force Summary (**item B**)
4. Flowage Easement Valuation Study (**item C**)
5. CCJWRD Update
6. Proposed 2018 Meeting Calendar (**item D**)
7. Other business
8. Next meeting January 17, 2017 (tentative)

*These minutes are subject to approval.*

**DIVERSION AUTHORITY  
Land Management Committee  
City Commission Room  
Fargo City Hall  
Wednesday, October 25, 2017  
3:00 p.m.**

Present: Clay County Commission Representatives Kevin Campbell and Jenny Mongeau; Moorhead City Engineer Bob Zimmerman; Fargo Division Engineer Nathan Boerboom; Fargo City Administrator Bruce Grubb; and Cass County Commission Representative Mary Scherling (via teleconference).

Others present: Eric Dodds of AE2S; City of Fargo Engineering Director Mark Bittner; and Cass County Joint Water Resource District Representative Mark Brodshaug.

Absent: CCJWRD Representative Rodger Olson; Moorhead Mayor Del Rae Williams; Oxbow Mayor Jim Nyhof; and Cass County Commission Representative Chad Peterson.

The meeting was called to order by Mr. Brodshaug.

Agenda Review

Mr. Zimmerman moved to approve the agenda. Second by Mr. Campbell. All the members present voted aye and the motion was declared carried.

Minutes Approved

Mr. Campbell moved the minutes from the September 27, 2017 meeting be approved. Second by Ms. Mongeau. All the members voted aye and the motion was declared carried.

Ms. Mongeau said as a point of clarification, she would like it noted that in the previous minutes, Mayor Williams was listed as absent when in fact she arrived late.

Property Acquisition Report

Mr. Dodds said there has not been a lot of movement in the acquisition status in the past few weeks; however, a few properties have changed status. He said a couple of closings have occurred and a few others are on the books. He said due to the injunction, no new purchase agreements or negotiations have started; therefore, this report will largely stay static for a while. In the upstream mitigation area, he said, there are flowage easements in hand due to the fact that the parcels are owned by a government entity. He said the anticipation is to do some type of quitclaim deed and get the easement without having to actually buy the easement. He said there is about \$15.5 million in land assets that have been purchased but not directly needed for the project. He said, for example, a property owner wanted to sell a full parcel and that full parcel was not needed; therefore, what was needed was carved out and assigned a hypothetical value. He said what is not needed could be liquidated to help balance the books.

In response to a question from Mr. Brodshaug about inlet properties, Mr. Dodds said appraisals of about \$6,500.00 an acre were given to the property owners and some property owners came back with double that amount and some said their property was worth five times the appraised amount. He said in those situations, it was good to go through a court process to determine real value. He said terms were agreed on with all the property owners at about twice the appraised value. He said the price was supported with additional appraisals and due to the fact that there had to be a way to stop the bleeding with attorney fees. He said there was good justification for each one and it seemed moving forward was more appropriate.

Mr. Brodshaug said those properties were the hardest to value due to the fact they are on higher ground and out of the floodplain. He said it was a successful negotiation and it showed condemnation is not always the end of the discussion.

#### CCJWRD Update

Mr. Brodshaug said the condemnation was the only item he wanted to discuss and the topic was addressed in the Property Acquisition Report.

#### Flowage Easement Valuation Plan

Mr. Dodds commented that there seems to be some agreement that the final project configuration will still have a staging area and the need for flowage easements. He said the value of the easements and the value of compensation for landowners has been a big question for many years. He said with the injunction, the pursuit and valuation of flowage easements has been put on hold; however, there is still interest in defining what the compensation amounts will be for impacted property owners. With encouragement from the people impacted, he said, there is interest in putting a mark in the sand and stating, based on this condition, the flowage easement might be worth "X," then use that amount as a starting point for more details. He said the project will likely have some changes; therefore, all flowage easements cannot be valued as they are known today. What is suggested, he said, is a representative sample of parcels selected to include raw farmland, woodland, property close to the embankment and most impacted, property far from the embankment with minimal impacts, property in the floodway and some land that may have development potential. He proposed selecting those types of representative parcels and hiring two appraisal firms to value the hypothetical easements. He said Crown Appraisal is very respected and Integra, of Minneapolis, has the most federally certified appraisers in the country. He said there is value in getting both firms to do some analysis and with the appraisal results, there will at least be some education about their methodology.

In response to a question from Mr. Brodshaug asking about sample flowage easement language, Mr. Dodds said there is an easement document that covers all the rights that will be obtained by the Diversion Authority as well as restrictions placed on the land and continued permitted uses of the land. For example, he said, if it is in the floodplain, development could occur if it is done in accordance with floodplain development rules. Others address restrictions of use on the property, he said; however, property owners cannot alter the ability of the land to store water. He said there would be no restrictions on farm use, as that volume will only be needed when the project operates.

Mr. Brodshaug said flowage easement language would have to include all uses that will be needed for the project and there needs to be discussion about insurance or some other guarantees if the project operates in the summer and there is crop damage.

Mr. Dodds said an appraiser will follow their professional rules and he expects they will do comparable sales with hypothetical conditions and value the land as it is today and with the project in place, then draw a conclusion as to the value of the easement. He said the Land Management Committee would not use those results to buy easements; however, it will provide good data and help discussions as to how to move forward. He said there also needs to be discussion about payment methods such as one-time up front, a 20-year annuity, pay when damaged and how the payments will be administered.

In response to a question from Mr. Brodshaug, asking if AE2S or the Diversion Authority will retain the appraisers, Mr. Dodds said he is open either way. He said he asked each of the appraisal firms for proposals.

Mr. Brodshaug said there was a request for quotes from appraisers, thinking the CCJWRD would hire them as a precursor to buying flowage easements. He said the deadline for proposals was reached about the same time as the injunction. He said the original proposal asked for an estimate on every parcel in the staging area and if the project is going to change, it does not make sense to continue with the original proposal. He said the appraisers should value a few parcels so the Land Management Committee can get a feel for what ballpark the values are in; however, 500 estimates are not needed.

Mr. Dodds said from an action standpoint, he would like the Land Management Committee to consider endorsing the plan and then go full speed ahead as proposed. If not, he said, there may be a delay getting this group started. In terms of a timeframe, he said, this will be a three- to six-month process and it would not be surprising if the proposals are in the six-figure range.

Ms. Mongeau said she has been critical in past that there has not been something like this going forward; however, she said she supports continuing the discussion to develop a framework for whatever size or scope the project will be. She said there will be a need to have some type of easement agreement to move forward and that would help with the criticisms about the budget and from possible impacted parties. She said to have a baseline is beneficial.

Mr. Brodshaug said it would also be useful to have a public meeting to lay out what the Land Management Committee will be doing and get some feedback.

Mr. Campbell said this is five or six years overdue. He said he knows when it comes to the state of Minnesota, they have not seen anything about the values to the impacted people and the DNR will be pleased to know there is a process. He said he has a concern about going into selective representative parcels. He said if there is a landowner who is not interested, they should be left alone.

In response to a question from Ms. Mongeau, asking if it will be public knowledge who is selected for the baseline appraisals, Mr. Dodds said appraisals could be done without contacting the property owner.

In response to a question from Mr. Campbell asking how the appraisers can get a true valuation without being on the property, Mr. Dodds said appraisers will drive by the property and review crop history reports. He said landowners input may influence the evaluation; however, knowing the project is going to change, the Land Management Committee needs to get appraisals that are 90 percent accurate, which will be more important than interviews with owners.

Ms. Scherling said this is long overdue and she is in support. She said having public input up front is important due to the fact that there might be some issues that are overlooked.

In response to a question from Mr. Bittner asking when it comes to the flowage easements, will the property owners be able to shift it around so it fits their parcel lines or if they have a development plan for part of it, what kind of change could be made in the acquisitions, Mr. Dodds said the plan is to obtain an easement over an entire parcel, even if only half is impacted. He said the logic was not to be overly restrictive and to recognize the actual impacted boundaries will follow a circuitous line based on water depth. He said if only half of a parcel is impacted, maybe as part of the acquisition the parcel could be split and have one with an easement and one without an easement. He said the parcel with the easement will have a new boundary that is not an exact curve of the water line and the other side of the property is unrestricted and not impacted.

Ms. Mongeau said if a farmer has a quarter section and only an eighth of it is affected, it does not make sense to put a restriction on the entire parcel. She said there clearly has been confusion in the past. She said while she sees the benefit of having public input, she gets concerned about how that would be perceived.

In response to a question from Mr. Brodshaug asking if Crown Appraisal's original proposal stays the same and if they will start with landowner meetings, Mr. Dodds said Crown knows many people in the upstream area so they have proposed arranging small team meetings and conducting some education; however, he said he does not know if that is appropriate right now. He said he would like to see two Committee members volunteer to help firm up the plan and talk with some property owners and see if there is willingness. He said this cannot be perceived as the Diversion Authority plowing forward with the project; however, sometimes perceptions get ahead of us. Landowner engagement is great, he said; however, sometimes it is not practical.

In response to a question from Mr. Grubb asking how many proposals were received with the RFQ, Mr. Dodds said there were four proposals and after ranking each one, Crown and Integra ranked best.

In response to a question from Mr. Campbell about a minimum federal process concerning flowage easements, Mr. Brodshaug said the U.S. Army Corps of Engineers

was involved in the development of the language of the easement. He said if this is a federal project, the USACE will have a required minimum language.

Mr. Campbell said if the appraisals go forward without landowner input, which he does not think is a good idea, the landowners should be the first ones talked to about the results. He said the Land Management Committee will not learn until some sort of a concept is shared with the landowner and they are allowed to have feedback. He said this cannot get out of hand and the process needs to be equal to everyone.

Mr. Dodds said if this work is done, some value will be returned, mainly in understanding how the appraisal model works. He said the project will change and the work done here will be useful for outreach and will not be used for acquiring easements.

Mr. Zimmerman said if property owners are not contacted, there is still a piece of land that is being valued and the obvious question that will come later from the landowner is how they relate to that matrix. He said if it is not made public, it will be requested to be made public. He said there needs to be voluntary participation.

Mr. Brodshaug said everyone seems interested and a proposal is needed to take to the Finance Committee to get the ball rolling. He said he hears many requests for upfront public input. He said at the next Land Management Committee meeting there should be discussion on how and when to have a kickoff meeting and if there should be public meetings in Comstock or Hickson.

In response to a question from Ms. Scherling asking if the intention of the appraisals is they be used as a baseline for individual easements or will it be "X" dollars per acre, much like what is done in the water resource district, Mr. Dodds said individual valuations will have to be done; however, if it can be concluded that there is little difference in value from parcel A to parcel B to parcel C, then the Land Management Committee can be comfortable in making some offers on that basis and perhaps get half of the easements locked up. He said that may be wishful thinking; however, it is a good goal due to the fact that if appraisals have to be done on 500 parcels, that will be \$2 million in appraisal fees alone.

Ms. Scherling said the appraisers are going to charge for this initial work; however, individual appraisals should not be paid for on top of the initial appraisals. She said the initial appraisals should be adjustable and she does not want to get double-charged.

Ms. Mongeau moved to approve a recommendation to move forward with flowage easements. Second by Mr. Boerboom. All the members present voted aye and the motion was declared carried.

#### Other Business

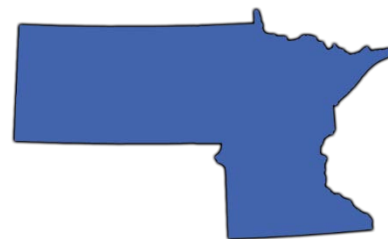
There was no other business.

Mr. Campbell moved the meeting be adjourned. Second by Mr. Boerboom. All the members present voted aye and the motion was declared carried.

The meeting adjourned at 3:45 p.m.

The next meeting will be November 15, 2017 at 3:00 p.m.

## ***Governors' Fargo-Moorhead Area Flood Diversion Task Force***



### **Summary of Potential Project Changes**

The recommendations from the Governors' Task Force will be forwarded for consideration to the Diversion Authority (DA), who will be responsible for submitting a new permit application for review by the Minnesota Department of Natural Resources (MDNR).

Below is a summary of the potential changes resulting from the work of the Governors' Task Force. A full report from the Task Force will be made available and posted on [www.fmdiversion.com/governors-task-force](http://www.fmdiversion.com/governors-task-force) as soon as it is available.

#### **Established the need for 100-Year FEMA accredited protection**

- The Task Force charter concluded that a minimum of 100-year FEMA accredited protection with the ability to fight floods greater than the 100-Year was a project requirement. This level of protection is necessary to eliminate the mandatory flood insurance purchase requirement for structures located within the 100-year floodplain.

#### **Confirmed requirement to maintain federal authorization**

- The Task Force confirmed the benefits of maintaining federal authorization through the U.S. Army Corps of Engineers.

#### **Established an agreed upon 100-Year flood level**

- The group unanimously agreed to utilize a peak flow of 33,000 cubic-feet per second (cfs) as the 100-year flood design discharge for the Red River at Fargo. This discharge is based on using hydrology data from the full period of record.

#### **Dismissed several alternatives, retained several alternatives**

- The Task Force reviewed alternatives and variations previously studied. A levees only option was dismissed from consideration as was a diversion alignment in Minnesota.
- All alternatives carried forward for additional consideration include a diversion channel, dam/southern embankment, and upstream storage area.
- Distributed storage was determined to be valuable for long-term flood risk management and to increase the level of protection; however, it was dismissed as an immediate project component for achieving 100-year certified protection for the Fargo-Moorhead metropolitan area.

#### **Increased the River Flow through town during a 100-Year flood**

- The Task Force studied several options for higher flows through town and generally found consensus on recommending an allowable river stage height in Fargo and Moorhead of 37 feet during a 100-year flood. This additional flow through town reduces the frequency of operation of the Diversion Project, which means that, had the Project been in place, it would have likely operated approximately 3-5 times over the last 117 years.



- This additional flow through town decreases the newly impacted acres upstream by more than 10 percent.
- This change would require an additional \$150 Million of construction and acquisition of 82 additional residential properties through the Fargo-Moorhead area.

#### **Modified the Western Tie Back Levee**

- Current Project design includes a tie-back levee that runs north-south along County Road 17 south of Horace. There was consensus to modify the design to move the tie-back location to the west in order to accommodate additional storage in Cass County and reduce storage elsewhere upstream. Changing the location of the Western Tie Back levee is estimated to add approximately \$4 Million of net costs to the overall Project cost.

#### **Added an Eastern Tie Back**

- Current Project design includes a levee that runs east of the control structure on the Red River into Clay County. There was consensus to modify this design by turning the levee south and forming an eastern tie back levee to reduce the amount of newly impacted acres in Minnesota. Adding the Eastern Tie Back levee is estimated to add approximately \$15 Million of net costs to the overall Project cost.

#### **Changed the location of Dam/Southern Embankment**

- In an attempt to better balance the impacts from the project, three alignments were reviewed in addition to the original alignment. No exact alternative was chosen, but there was general agreement that the alignment of the southern embankment would move north on the North Dakota side to preserve more existing floodplain and more closely balance the impacts between the two states. In addition, the current alignment on the Minnesota side, with the addition of the Eastern Tie Back, was utilized with all the alternatives. It was determined that moving the embankment north in Minnesota resulted in additional Minnesota impacts and therefore was not recommended. Moving the embankment north is estimated increase the dam length approximately seven to 12 additional miles and estimated to add approximately \$135 Million to \$270 Million of net costs to the overall Project cost.

#### **Considered additional storage north of the metro area**

- The Task Force reviewed a potential change to the diversion alignment north of the metro area to try to preserve existing floodplain. The analysis showed that this change did not significantly reduce the upstream impacts. There was consensus to leave this option on the table to look at further through the permitting process.

#### **Consider allowing downstream impacts up to a maximum of 6 inches**

- The Task Force discussed balancing the impacts between upstream and downstream. One option under consideration was to increase the allowable downstream impacts to a maximum of 6 inches during the 100-year flood. It was noted that this component was an operational consideration, not a design feature and the discussion could take place at a later time. The required mitigation for this option was not fully studied and would also be a consideration at a later date.
- The Task Force expressed strong concern about any potential impacts at the Canadian border and the delays that could mean for implementing flood protection.



**Technical Advisory Group Recommendation**

Meeting Date: 12/15/2017

**RECOMMENDATION FOR ACTION:**

The Technical Advisory Group has reviewed and recommends approval of the following Contract Action(s).

**SUMMARY OF CONTRACTING ACTION:**

Per the contract review and approval procedures that were adopted by the Diversion Authority on November 10, 2016, the Owner’s Program Management Consultant (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. In this instance, the PMC is submitting this professional services contract to TAG for review prior to Finance Committee.

The Owner’s Representative has reviewed and recommends the following Contract Action(s):

<b>Description</b>	<b>Budget Estimate (\$)</b>
<p><b>Crown Appraisals, Inc.</b></p> <p><i>Task Order 1 - Amendment 0</i></p> <ul style="list-style-type: none"> <li>• Flowage Easements Valuation – Phase 1</li> </ul>	<b>\$500,000</b>

**Summary of Contracting History and Current Contract Action:**

Original Agreement or Amendment	Previous Project Cost	Budget (\$) Change	Revised Project Cost	Project Start	Project Completion	Comments
Task Order 1, Amendment 0	0.00	0.00	\$500,000	21-Dec-17	31-Aug-18	Flowage Easements Valuation – Phase 1

**BACKGROUND AND DISCUSSION:**

The Fargo-Moorhead Area Flood Diversion Project (Project) requires retention of flood waters within a staging area upstream of the metro area during extreme events. The upstream retention of flood waters is necessary to mitigate downstream impacts from operation of the Project. The Diversion Authority is required to mitigate the impacts of upstream flood water retention. Part of the mitigation includes purchasing permanent flowage easements for the right to periodically and temporarily store water on the land in the upstream mitigation area.

In recognition of the need to better estimate the value of flowage easements, the Diversion Authority and Cass County Joint Water Resource District (CCJWRD) issued a request for qualifications for appraisal services in July 2017. Four proposals were received and reviewed in September 2017, and the proposal from Crown Appraisals, Inc. was the top ranked. The RFQ and original proposals were developed based on the Project prior to the federal court injunction, and therefore the contracting action was put on hold. Subsequently, with the encouragement from the Governors’ Task Force, additional discussions indicated a strong desire and need to start the process of defining flowage easement values. As such, the original proposal from Crown Appraisals, Inc. was split into phases.

The Diversion Authority recognizes that establishing an appropriate value for the flowage easements is a complex and important task. The Diversion Authority also recognizes that the exact location of the upstream mitigation area will be defined upon further detailed technical analysis, hydraulic modeling, and permitting of changes to the Project resulting from the Flood Diversion Task Force established by the Governors’ of Minnesota and North Dakota. In recognition of these considerations, the Diversion Authority believes it is prudent to start the process of valuing flowage easements by authorizing Consultant to conduct Phase 1 of the flowage easements valuation services.

Phase 2 of the flowage easements valuation services is anticipated to include utilizing the results from Phase 1 to streamline the production of individual property valuation reports. It is anticipated that an Amendment would be issued to authorize Phase 2 services after the exact location, boundaries, and operation of the upstream mitigation area is determined through detailed technical analysis, hydraulic modeling, and permitting. Commencing with Phase 1 now will allow the data gathering and regression model development to proceed in a parallel timeframe to the technical hydraulic modeling.

**FINANCIAL CONSIDERATIONS:**

Crown Appraisals, Inc. provided a proposal for flowage easement valuation services, based on attached draft Task Order 1, Amendment 0. The PMC reviewed the proposed services and fees, and considers them reasonable for the scope of work.

The table below shows the recommended Amendment budgets.

Flowage Easement Valuation	Activity ID	Current Budget (\$)	Change (\$)	Revised Budget (\$)
Phase 1		500,000		
<b>TOTAL</b>		<b>500,000</b>		

This amount of \$500,000 is included in the proposed FY-2018 MFDA budget.

**ATTACHMENT(S):**

1. DRAFT MSA
2. DRAFT Task Order 1 Amendment 0

Submitted by:

*John W. Glatzmaier*  
\_\_\_\_\_  
John Glatzmaier  
CH2M  
Metro Flood Diversion Project

December 15, 2017  
\_\_\_\_\_  
Date

\_\_\_\_\_  
Nathan Boerboom, Diversion Authority Project  
Manager  
Concur: \_\_\_\_\_ Non-Concur: \_\_\_\_\_

\_\_\_\_\_  
Robert Zimmerman, Moorhead City Engineer  
Concur: December 15, 2017 Non-Concur \_\_\_\_\_

\_\_\_\_\_  
Mark Bittner, Fargo Director of Engineering  
Concur: \_\_\_\_\_ Non-Concur: \_\_\_\_\_

\_\_\_\_\_  
Jason Benson, Cass County Engineer  
Concur: December 15, 2017 Non-Concur \_\_\_\_\_

\_\_\_\_\_  
David Overbo, Clay County Engineer  
Concur: \_\_\_\_\_ Non-Concur: \_\_\_\_\_

\_\_\_\_\_  
Jeff Ebsch, Assistant Cass County Engineer, Diversion  
Authority Project Manager  
Concur: December 15, 2017 Non-Concur \_\_\_\_\_

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**MASTER AGREEMENT FOR PROFESSIONAL SERVICES**

**Related to:**

**THE  
FARGO-MOORHEAD AREA DIVERSION PROJECT**

**BY AND BETWEEN**

**METRO FLOOD DIVERSION AUTHORITY  
as Diversion Authority**

**and**

**CROWN APPRAISALS, INC.  
as Consultant**

**Dated as of December 21, 2017**

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This instrument was drafted by:  
Ohnstad Twichell, P.C.  
John T. Shockley  
P.O. Box 458  
West Fargo, North Dakota 58078-0458

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**EXHIBIT A: TASK ORDER 1 - GENERAL SCOPE OF SERVICES**

## MASTER AGREEMENT FOR PROFESSIONAL SERVICES

THIS MASTER AGREEMENT FOR PROFESSIONAL SERVICES (the “Agreement”) is made as of **December 21, 2017**, by and between the Metro Flood Diversion Authority (the “Diversion Authority”) and Crown Appraisals, Inc. (“Consultant”) (collectively, the “parties”).

WHEREAS, the Diversion Authority has selected Consultant to provide the Diversion Authority with professional services, subject to the oversight of the Co-Executive Directors, Executive Director, and the Diversion Authority Board; and

WHEREAS, the Diversion Authority desires to enter into a master agreement for professional services with Consultant and retain Consultant to provide professional services for the Fargo-Moorhead (FM) Area Diversion Project, commencing on **December 21, 2017**.

NOW THEREFORE, it is agreed by and between the parties as follows:

1. **EMPLOYMENT**. The Diversion Authority hires Consultant, which accepts the hiring with the Diversion Authority pursuant to this Agreement. Consultant is an independent contractor under this Agreement. Nothing in this Agreement shall be construed to create an employer-employee relationship between the parties.
2. **DEFINITIONS**. All capitalized terms used and not otherwise defined herein shall have the meanings given to them in this Agreement as defined in this Section, unless a different meaning clearly applies from the context.

“*Agreement*” means this Master Agreement for Professional Services by and between the Metro Flood Diversion Authority and Crown Appraisals, Inc.

“*Best Efforts*” means that the parties to this Agreement will act in Good Faith, act in accordance with generally accepted commercial practices, and use reasonable due diligence to undertake all action contemplated by this Agreement, in accordance with applicable federal and state laws, regulations, and rules; however, the obligation to use Best Efforts does not mean a duty to take action that would be in violation of applicable federal or state law.

“*Cass County Joint Water Resource District*” means the Cass County Joint Water Resource District, a political subdivision of the State of North Dakota, its successors and assigns.

“*City of Fargo*” means the City of Fargo, a North Dakota Home Rule City and political subdivision of the State of North Dakota.

“*Consultant*” means the individual or entity with which the Owner has contracted for performance of the services as set forth in this Agreement.

“*Diversion Authority*” has the same meaning as Metro Flood Diversion Authority.



*“Diversion Authority Board”* means the Governing Body of the Metro Flood Diversion Authority.

*“Effective Date”* means **December 21, 2017**.

*“Executive Director”* means the Chief Administrative Officer of the Metro Flood Diversion Authority. The term also includes Co-Executive Director.

*“Fargo-Moorhead Metropolitan Area”* means Fargo, North Dakota, Moorhead, Minnesota, and surrounding communities; it is further defined by the United States Census Bureau as comprising all of Cass County, North Dakota, and Clay County, Minnesota, which includes the cities of Dilworth, Minnesota, West Fargo, North Dakota, and numerous other towns and developments from which commuters travel daily for work, education, and regular activities.

*“Fargo-Moorhead Metropolitan Area Flood Risk Management Project”* has the same definition as “Project” in this Agreement and is the name given to the Project by the USACE.

*“Good Faith”* means observance of reasonable commercial standards of fair dealing in a given trade or business.

*“Governing Body”* means the body which performs the legislative and governmental functions of a political subdivision, including but not limited to, a board, council, or commission. For example, the Cass County Commission, the Clay County Commission, the Moorhead City Council and the Fargo City Commission are the Governing Body of each of said entities as the board for the CCJWRD is the Governing Body for that entity.

*“JPA”* or *“Joint Powers Agreement”* means the agreement dated as of June 1, 2016, by and between the Member Entities.

*“LJPA”* or *“Limited Joint Powers Agreement”* means the agreement dated July 11, 2011, and subsequently amended, which was entered into between the City of Moorhead, the City of Fargo, Clay County, Cass County, the Buffalo-Red River Watershed District and the Cass County Joint Water Resource District in order to cooperate in the planning and design phase of the Locally Preferred Plan.

*“Member Entities”* shall mean the City of Moorhead, the City of Fargo, Clay County, Cass County, and Cass County Joint Water Resource District.

*“Metro Flood Diversion Authority”* means the political subdivision created by the LJPA and continued through and vested with the powers set forth in the JPA.

*“Owner”* means the individual or entity with which the Consultant has contracted regarding the services set forth herein, and which has agreed to pay Consultant for the performance of the services, pursuant to the terms of this Agreement.

“*Person*” means any natural or legal person, county, city, municipality, political subdivision, public benefit corporation, corporation, limited liability company, trust, joint venture, association, company, partnership, governmental authority, or other entity.

“*Program Management Consultant*” means CH2M HILL Engineers, Inc., its successors and assigns, which provides Program Management Consultant services to the Diversion Authority pursuant to the Master Agreement for Professional Services dated January 13, 2017.

“*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 and as amended by the Non-Federal sponsors (City of Fargo, City of Moorhead, Metro-Flood Diversion Authority).

3. AUTHORIZATION TO PROCEED. Execution of this Agreement by the Diversion Authority will be authorization for Consultant to proceed with the work, unless otherwise provided for in this Agreement.
4. PRIOR AGREEMENTS. Any prior agreements between the Diversion Authority or its Member Entities and Consultant shall, upon execution of this Agreement, be terminated and have no further force and effect. Upon execution of this Agreement, the Initial Agreement shall terminate and have no further force and effect. Consultant shall send the final invoice pursuant to the Initial Agreement no later than \_\_\_\_\_, 2018. If Consultant fails to send the final invoice by such date, Cass County Joint Water Resource District and the Diversion Authority reserve the right to withhold payment for the services reflected in the final invoice. Any Task Orders executed and completed per the Initial Agreement shall remain subject to the terms and conditions set forth in the Initial Agreement. Any Task Orders between the Diversion Authority or its Member Entities and Consultant entered into on or after the effective date of this Agreement shall be subject to the terms of this Agreement.
5. SCOPE OF SERVICES. Diversion Authority has requested Consultant provide real estate appraisal services, or related services for the Project, generally as set forth in the attached **Exhibit A**. Consultant’s detailed scope of services, work schedule, and cost budget will be mutually agreed upon in writing and set forth in Task Orders issued by the Diversion Authority under this Agreement directly or through the Diversion Authority’s designated Program Management Consultant. Each Task Order will specifically refer to and incorporate this Agreement by reference, and the provisions of this Agreement shall apply to all Task Orders entered into subsequent to the Effective Date of this Agreement. In general, Consultant’s services will include services in support of the Fargo-Moorhead Area Diversion Project as mutually agreed upon between the parties.

6. CHANGES TO SCOPE OF SERVICES. The Diversion Authority may make or approve changes within the general scope of services in this Agreement. If such changes affect Consultant's cost of or time required for performance of the services as set out in any applicable Task Order, then an equitable adjustment will be made through an amendment to the applicable Task Order or this Agreement.
7. RESPONSIBILITY FOR ERRORS OR DELAYS FROM INACCURATE DATA. Consultant and the Diversion Authority acknowledge that the reliability of Consultant's services depends upon the accuracy and completeness of the data supplied to Consultant. The Diversion Authority accepts sole responsibility for errors or delays in services resulting from inaccurate or incomplete data supplied to Consultant, and the Diversion Authority acknowledges and agrees that any additional services thereby necessitated will result in additional fees payable by the Diversion Authority to Consultant. Consultant must receive promptly the information to deliver the services as well as the Diversion Authority's prompt updates to any information where there has been a material change which may affect the scope or delivery of the services, such as a change in the nature of the Diversion Authority's products or equipment, systems, and/or processes that are the focus of Consultant's service(s).
8. TASK ORDERS. Consultant shall receive assignments for work under this Agreement through Task Orders authorized and provided by the Diversion Authority directly or through its designated Program Management Consultant. The Diversion Authority shall compensate Consultant only for work contained within the Task Orders. Consultant shall not be obligated to perform any work or services unless such services are set forth in an executed Task Order. If Consultant engages in work beyond the scope of a Task Order, the Diversion Authority shall not compensate Consultant for that work, unless agreed to in writing by the Diversion Authority prior to the work being completed. All amendments to Task Orders must be authorized and provided by the Diversion Authority in writing. The time or schedule for performing services or providing deliverables shall be stated in each Task Order. If no times are stated, then Consultant will perform services and provide deliverables within a reasonable time. Consultant is not responsible for any delays in execution of its services or work due to the absence of an executed Task Order or amendment to a Task Order.
9. PERSONNEL. All persons assigned by Consultant to perform services as set forth in Task Orders issued under this Agreement shall be fully qualified to perform the work assigned to them. Consultant shall devote such personnel and resources, time, attention and energies to the Diversion Authority's business as are necessary to fulfill the duties and responsibilities required by the Diversion Authority and agreed to by Consultant in any given Task Order. Consultant must endeavor to minimize turnover of personnel performing services under this Agreement. If the Diversion Authority is dissatisfied with any of Consultant's personnel, the Diversion Authority reserves the right to require removal of those personnel from the Task Order. The Diversion Authority shall provide Consultant with a written statement, including reasonable detail, outlining its reasons for desiring removal. Replacement personnel for the removed person shall be fully qualified for the position.

10. SUBCONTRACTORS. Consultant may enter into agreements with subcontractors in furtherance of their services under this Agreement, as approved by the Diversion Authority's Co-Executive Directors, whose approval shall not be unreasonably withheld.
11. TERM. Unless terminated under Section 34, this Agreement shall remain in full force and effect for a period of approximately three (3) years from the date of execution on **December 21, 2017**, through **December 31, 2020**. This Agreement shall take full force and effect on **December 21, 2017**, upon approval and execution by the Diversion Authority Board. Pursuant to Section 12 of this Agreement and upon expiration of the initial term of this Agreement, this Agreement may be renewed by mutual agreement of the parties.
12. EXTENSION OF TERM. This Agreement may be extended by written amendment or renewed as set forth in Section 11 of this Agreement. If this Agreement expires before the completion of a Task Order, the Agreement shall be deemed to have been extended until the completion of services under the applicable Task Order.
13. COMPENSATION. For all services rendered by Consultant, the Diversion Authority will pay Consultant based on the terms established in each Task Order.

The compensation is payable following the submission by Consultant of an invoice setting forth the services performed on behalf of the Diversion Authority. Invoices shall be sent as required in Section 14 of this Agreement. Invoices are due and payable within thirty (30) days of receipt. If a work order issued under this Agreement contains a not-to-exceed compensation amount, the Diversion Authority will only pay compensation to Consultant for fees and/or expenses that are less than or equal to the not-to-exceed amount stated on the work order, unless the work order has been amended pursuant to Section 8 of this Agreement.

- A. Budget. Budgetary amounts, excluding taxes, will be established for each Task Order executed under the Agreement. Consultant will make reasonable efforts to complete the work within the budget and will keep the Diversion Authority informed of progress toward that end so that the budget or work effort can be adjusted if found necessary. Consultant is not obligated to incur costs beyond the indicated budgets, as may be adjusted, nor is the Diversion Authority obligated to pay Consultant beyond these limits. When any budget has been increased, Consultant's costs expended prior to such increase will be allowable to the same extent as if such costs had been incurred after the approved increase.
- B. Hourly Rates. Hourly rates are those hourly rates charged for work performed on the Project by Consultant's employees of the indicated classifications. These rates include all allowances for salaries, overhead, fees, and all expenses, but do not include allowances for subcontracts or outside services allowed by this Agreement.

14. INVOICING AND PAYMENT.

A. Consultant must submit invoices to the Diversion Authority on the fifteenth (15<sup>th</sup>) day of each month for all services provided and allowed expenses incurred during the preceding month. Consultant's Project Manager must personally review each invoice before it is sent to the Diversion Authority to determine its accuracy and fairness, and to ensure the invoice complies with the requirements in this Agreement. Each invoice will be entered into the Aconex system and processed by the Diversion Authority for the following month.

B. Consultant must submit each original invoice to Eric Dodds, AE2S, and submit a copy of each invoice to Nathan Boerboom, Metro Flood Diversion Authority:

AE2S  
c/o Eric Dodds  
4170 28<sup>th</sup> Avenue S.  
Fargo, ND 58104  
[Eric.Dodds@ae2s.com](mailto:Eric.Dodds@ae2s.com)

Metro Flood Diversion Authority  
c/o Nathan Boerboom  
200 3<sup>rd</sup> Street North  
Fargo, ND 58102  
[N.Boerboom@cityoffargo.com](mailto:N.Boerboom@cityoffargo.com)

C. Consultant's invoices must be detailed and precise. Consultant's invoices must clearly indicate fees and expenses incurred for the current billing period month and include at least the following information:

- (1) Consultant's name and address;
- (2) Consultant's federal employer identification number;
- (3) Unique invoice number;
- (4) Billing period;
- (5) Description of activities performed;
- (6) Work order number associated with each activity, in accordance with the Task Order Budgetary Breakdown;
- (7) Name, billing rate, and hours worked by each person involved in each activity, in accordance with and as necessary per the Task Order Budgetary Breakdown;
- (8) Total amount of fees and costs "billed to date," including the preceding month;
- (9) Preferred remittance address, if different from the address on the invoice's coversheet; and
- (10) All of the work performed during that billing period, in accordance with the Task Order Budgetary Breakdown.

D. Consultant's invoice must be printed on a printed bill head and signed by the Project Manager or other authorized signatory.

- E. If any Consultant invoices contain requests for expense reimbursement, Consultant must include copies of the corresponding invoices and receipts with that invoice.
  - F. After the Diversion Authority receives Consultant's invoice, the Diversion Authority will either process the invoice for payment or give Consultant specific reasons, in writing within fifteen (15) business days, why part or all of the Diversion Authority's payment is being withheld and what actions Consultant must take to receive the withheld amount.
  - G. In the event of a disputed billing, only the disputed portion will be withheld from payment, and the Diversion Authority shall pay the undisputed portion. The Diversion Authority will exercise reasonableness in disputing any bill or portion thereof. Interest will accrue on any disputed portion of the billing determined to be due and owing to Consultant.
  - H. Payment does not imply acceptance of services, that expenses are allowable, or that the invoice is accurate. In the event an error is identified within three (3) months of receipt of payment, Consultant must credit any payment in error from any payment that is due or that may become due to Consultant under this Agreement.
  - I. The Diversion Authority will be charged interest at the rate of one-half percent (1/2%) per month, or that permitted by law if lesser, on all past-due amounts starting thirty (30) days after receipt of invoice. Payments will be first credited to interest and then to principal.
  - J. If the Diversion Authority fails to make payment in full within thirty (30) days of the date due for any undisputed billing, Consultant may, after giving seven (7) days' written notice to the Diversion Authority, suspend services under this Agreement until paid in full, including interest. In the event of suspension of services, Consultant will have no liability to the Diversion Authority for delays or damages caused by the Diversion Authority because of such suspension.
  - K. Without waiving any rights to recover payment for reimbursable taxes, fees or other costs per the provisions of Paragraph 13 herein, Consultant must pay in the first instance all fees, fines, taxes, or other costs of doing business related to the services.
15. RELATIONSHIP BETWEEN PARTIES. Consultant is retained by the Diversion Authority only for the purposes and to the extent set forth in this Agreement, and its relationship to the Diversion Authority shall, during the period or periods of services under this Agreement, be that of an independent contractor. Consultant shall be free to use such portion of Consultant's entire time, energy and skill during the course of this Agreement to meet its contractual obligation to the Diversion Authority. Neither Consultant, nor its personnel, shall be considered to be employed by the Diversion Authority or entitled to participate in any plans, arrangements or distributions by the Diversion Authority pertaining to or in connection with any benefits accorded the Diversion Authority's regular employees. The Diversion Authority shall not be financially responsible to Consultant

except for the payment of compensation specifically set forth in this Agreement, and shall not be responsible for the payment of any cost of living allowances, merit increases, medical insurance, employee's retirement, life or disability coverage, sick leave or holiday pay or vacation pay or any benefit of any kind not specifically set forth in this Agreement. Likewise, the Diversion Authority shall not be responsible for wage or salary withholding to the federal or any state government.

16. REPRESENTATIONS AND WARRANTIES. Consultant represents and warrants that the following statements are true:

- A. Consultant has not directly or indirectly offered or given any gratuities (in the form of entertainment, gifts, or otherwise) to any member of the Diversion Authority with a view toward securing this Agreement or securing favorable treatment with respect to any determinations concerning the performance of this Agreement.
- B. The team members performing the work hereunder have no interest that would constitute a conflict of interest with the Diversion Authority during the term of the Project. This does not preclude or prohibit other Consultant employees or representatives from working with other parties who may participate on the Project and have potential or actual adverse interest to the Diversion Authority.
- C. This Agreement does not constitute a conflict of interest or default under any of Consultant's other agreements.
- D. No suit, action, arbitration, or legal, administrative, or other proceeding or governmental investigation is pending or threatened that may adversely affect Consultant's ability to perform under this Agreement.
- E. Consultant is in compliance with all laws, rules, and regulations applicable to its business, including rules of professional conduct (the "Laws and Regulations").
- F. During the term of this Agreement, Consultant must not take any action, or omit to perform any act, that may result in a representation becoming untrue. Consultant must immediately notify the Diversion Authority if any representation and warranty becomes untrue.
- G. THIS WARRANTY SHALL BE IN LIEU OF AND EXCLUDES ALL OTHER IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE OR OTHERWISE.

17. WORKING RELATIONSHIP. Consultant's Principal-in-Charge and Project Manager shall be the individuals that will engage with the Diversion Authority Board and the Diversion Authority's Executive Director(s). Consultant shall work in close cooperation and coordinate with the Diversion Authority's Program Management Consultant.

18. INDEPENDENT PROFESSIONAL JUDGMENT. Nothing in this Agreement shall be construed to interfere with or otherwise affect the rendering of services by Consultant in accordance with the independent professional judgment of each of its employees. Consultant shall require its personnel to perform the services rendered in accordance with accepted principals of its industry in the State of North Dakota. Consultant personnel are subject to the rules and regulations of any and all licensing and professional organizations or associations to which those personnel may from time to time belong, and the laws and regulations in the State of North Dakota.
19. STANDARD OF CARE. The standard of care applicable to Consultant's services will be the degree of skill and diligence normally employed by professional consultants or consultants performing the same or similar services at the time said services are performed. Consultant will re-perform any services not meeting this standard without additional compensation.
20. SUBSURFACE INVESTIGATIONS. In soils, foundation, groundwater, and other subsurface investigations, the actual characteristics may vary significantly between successive test points and sample intervals and at locations other than where observations, exploration, and investigations have been made. Because of the inherent uncertainties in subsurface evaluations, changed or unanticipated underground conditions may occur that could affect total Project cost and/or execution. These conditions and cost/execution effects are not the responsibility of Consultant.
21. CONSULTANT'S INSURANCE. Consultant shall maintain throughout this Agreement the following insurance:
- A. Consultant shall purchase and maintain throughout this Agreement such insurance as is required by this Agreement in the categories and amounts set forth below:
- (1) Claims under workers' compensation, disability benefits, and other similar employee benefit acts;
  - (2) Claims for damages because of bodily injury, occupational sickness or disease, or death of Consultant's employees;
  - (3) Claims for damages because of bodily injury, sickness or disease, or death of any person other than Consultant's employees;
  - (4) Claims for damages insured by reasonably available personal injury liability coverage which are sustained:
    - (a) by any person as a result of an offense directly or indirectly related to the employment of such person by Consultant, or
    - (b) by any other person for any other reason;



- (5) Claims for damages, other than to the work itself, because of injury to or destruction of tangible property wherever located, including loss of use resulting therefrom; and
- (6) Claims for damages because of bodily injury or death of any person or property damage arising out of the ownership, maintenance, or use of any motor vehicle.

B. The policies of insurance required by this Section will:

- (1) With respect to insurance required by above paragraphs 21(A)(3) through 21(A)(6) inclusive, be written on an occurrence basis, included as additional insureds (subject to any customary exclusion regarding Professional Liability and Workers Compensation) the Diversion Authority, and any other individuals or entities identified, all of whom will be listed as additional insureds, and include coverage for the respective officers, directors, members, partners, employees, agents, consultants, and subcontractors of each and any of all such additional insured, and the insurance afforded to these additional insureds will provide primary coverage for all claims covered in the General Liability and Automobile Liability Policies;
  - (a) All insurance policies required under this Agreement, including the Excess or Umbrella Liability Policies, must be from insurers rated "A-" or better by the A.M. Best Company, Inc.
- (2) Include at least the specific coverages and be written for not less than the limits of liability specified or required by Laws or Regulations, whichever is greater;
- (3) Contain a provision or endorsement that the coverage afforded will not be canceled or renewal refused until at least thirty (30) days prior written notice has been given to the Diversion Authority and to each other additional insured identified to whom a certificate of insurance has been issued (and the certificates of insurance furnished by Consultant pursuant to this Section will so provide);
- (4) Remain in effect at least until final payment and at all times thereafter when Consultant may be correcting, removing, or replacing defective work;
- (5) Include completed operations coverage:
  - (a) Such insurance will remain in effect for two (2) years after final payment.
  - (b) Consultant will furnish the Diversion Authority and each other additional insured identified, to whom a certificate of insurance has been issued, evidence satisfactory to the Diversion Authority and any such additional insured of continuation of such insurance at final payment and one (1) year thereafter.

- (6) Not limit in any way Consultant’s duties to defend, indemnify, and hold harmless the Diversion Authority and the State of North Dakota, and those parties’ officers, employees, agents, consultants, subcontractors, and representatives in accordance with Section 31;
  - (7) Either in the policies or in endorsements, contain a “waiver of subrogation” (except for in the Professional Liability Policy and Workers Compensation Policy) that waives any right to recovery any of Consultant’s insurance companies might have against the Diversion Authority.
  - (8) Either in the policies or in endorsements, contain a provision that Consultant’s insolvency or bankruptcy will not release the insurers from payment under the policies, even when Consultant’s insolvency or bankruptcy prevents Consultant from meeting the retention limits under the policies;
  - (9) Either in the policies or in endorsements, contain cross liability/severability of interests, to ensure that all additional parties are covered as if they were all separately covered (with the exception of Workers Compensation and Professional Liability Policies);
  - (10) Either in the policies or in endorsements, contain a provision that the legal defense provided to the Diversion Authority and the State of North Dakota must be free of any conflict of interest, even if retention of separate legal counsel is necessary;
  - (11) Either in the policies or in endorsements, contain a provision that any attorney who represents the State of North Dakota must first qualify as and be appointed by the North Dakota Attorney General as a Special Assistant Attorney General as required under N.D.C.C § 54-12-08;
  - (12) Either in the policies or in endorsements, contain a provision that Consultant’s policies will be primary and noncontributory regarding any other insurance maintained by or available to the Diversion Authority or the State of North Dakota, and that any insurance maintained by those parties will be in excess of Consultant’s insurance and will not contribute with it (except for Worker’s Compensation and Professional Liability Policies).
- C. The limits of liability for the insurance required by this Section will provide coverage for not less than the following amounts or greater where required by Laws and Regulations:
- (1) Worker’s Compensation, and related coverages under paragraphs 21(A)(1) and 21(A)(2):
 

(a) State:	Statutory;
(b) Applicable Federal (e.g. Longshoreman’s):	Statutory;
(c) Employer’s Liability:	\$1,000,000.

(2) Consultant's General Liability under paragraphs 21(A)(3) through 21(A)(6) which will include premises or operations coverage, completed operations and product liability coverages, and will eliminate the exclusion with respect to property under the care, custody, and control of Consultant:

- (a) General Aggregate: \$2,000,000
- (b) Products- Completed Operations Aggregate: \$1,000,000
- (c) Personal and Advertising Injury: \$1,000,000
- (d) Each Occurrence (Bodily Injury and Property Damage): \$1,000,000
- (e) Property damage liability insurance will provide Explosion, Collapse, and Under-ground coverages where applicable.
- (f) Excess or Umbrella Liability:
  - i. General Aggregate: \$2,000,000
  - ii. Each Occurrence: \$2,000,000

(3) Automobile Liability under paragraph 21(A)(6) (which will include coverage for any auto, including owned, non-owned, and hired):

- (a) Bodily Injury:
  - i. Each person: \$1,000,000
  - ii. Each accident: \$1,000,000
- (b) Property Damage:
  - i. Each accident: \$1,000,000
- OR
- (c) Combined Single
  - i. Limit of: \$1,000,000

(4) Professional Liability coverage will provide coverage for not less than the following amounts:

- (a) Each claim made: \$1,000,000
- (b) Annual Aggregate: \$1,000,000

(5) The following will be included as additional insured on all of Consultant's General Liability and Automobile Insurance Policies required under this Agreement:

- (a) Cass County Joint Water Resource District; and
- (b) Diversion Authority.

(6) If Consultant is domiciled outside of the State of North Dakota, Consultant will purchase and maintain employer's liability or "stop gap" insurance of not less than \$1,000,000 as an endorsement on Consultant's Workers' Compensation and General Liability Policies.

- D. Consultant will ensure that any of its subcontractors or subconsultants secure and maintain insurance policies and endorsements required of Consultant and the Diversion Authority in limits no less than those specified and required to be passed down to subcontractors in Paragraph 8 of the Diversion Authority's contract with the North Dakota State Water Commission.
- E. If any required policy is written on a "claims made" form, Consultant must maintain the coverage continuously throughout the term of this Agreement, and, without lapse, for three (3) years beyond the termination or expiration of this Agreement and the Diversion Authority's acceptance of all services provided under this Agreement. The retroactive date or "prior acts inclusion date" of any "claims made" policy must be no later than the date that services commence under this Agreement.
- F. Before Consultant begins performing services, Consultant must send the Diversion Authority certificates of insurance and any applicable endorsements attesting to the existence of coverage. Consultant will not allow its policies to be cancelled, lapse, and/or terminate or be amended to reduce coverage below the minimums called for in this Agreement without thirty (30) days' notice to the Diversion Authority. The certificates of insurance issued to confirm Consultant's compliance must reference this Agreement.
- G. If required insurance lapses during the term of this Agreement, the Diversion Authority is not required to process invoices after such lapse until Consultant provides evidence of reinstatement that is effective as of the lapse date.
- H. The Diversion Authority shall have no specific responsibility to provide any general liability coverage or worker's compensation coverage for the benefit of Consultant's employees during the terms of this Agreement.
22. THIRD PARTY DESIGNERS. The Diversion Authority and Consultant acknowledge and agree that some of the design services for the Project will be separately engaged by the Diversion Authority through retention of separate design professionals or provided by the USACE. Notwithstanding any provision to the contrary, Consultant shall have no responsibility for the accuracy or sufficiency of documentation prepared by those design professionals. Consultant will notify the Diversion Authority of errors, discrepancies and inconsistencies it may discover in such documents. If such errors, discrepancies or inconsistencies cause an increase in cost or the time for performance, Consultant shall be entitled to an equitable adjustment. In the event Consultant performs constructability reviews, value engineering or any other reviews or tasks involving the design for the work contemplated by the Project, it is understood that such reviews will not render Consultant liable in any manner for the duties of the Diversion Authority's separately-retained design professionals or the USACE.
23. OPEN RECORDS. Consultant will cooperate with the Diversion Authority in responding to any request for documents by any third party to the extent such documents may be

required to be disclosed under Chapter 44-04 of North Dakota Century Code regarding open records laws.

24. DATA FURNISHED BY THE DIVERSION AUTHORITY. The Diversion Authority will provide to Consultant all data in the Diversion Authority's possession relating to Consultant's services on the Project. Consultant may reasonably rely upon the accuracy, timeliness, and completeness of the information provided by the Diversion Authority.
25. ACCESS TO FACILITIES AND PROPERTY. The Diversion Authority will make its facilities accessible to Consultant as required for Consultant's performance of its services and will provide labor and safety equipment as required by Consultant for such access. The Diversion Authority will perform, at no cost to Consultant, such tests of equipment, machinery, pipelines, and other components of the Diversion Authority's facilities as may be required in connection with Consultant's services.
26. ADVERTISEMENTS, PERMITS, AND ACCESS. Unless otherwise agreed to in the Scope of Services of a Task Order, the Diversion Authority will obtain, arrange, and pay for all advertisements for bids; permits and licenses required by local, state, or federal authorities; and land, easements, rights-of-way, and access necessary for Consultant's services or Project construction.
27. TIMELY REVIEW. The Diversion Authority will examine Consultant's studies, reports, sketches, drawings, specifications, proposals, and other documents; obtain advice of an attorney, insurance counselor, accountant, auditor, bond and financial advisors, and other consultants as the Diversion Authority deems appropriate; and render in writing decisions required by the Diversion Authority in a timely manner.
28. PROMPT NOTICE. The Diversion Authority will give prompt written notice to Consultant whenever the Diversion Authority observes or becomes aware of any development that affects the scope or timing of Consultant's services, or of any suspected or actual defect in the work of Consultant or their third party designers or subcontractors.
29. OWNER'S INSURANCE.
  - A. The Diversion Authority will maintain property insurance on all pre-existing physical facilities associated in any way with the Project.
  - B. The Diversion Authority will provide for a waiver of subrogation as to all Owner-carried property damage insurance, during appraisals and thereafter, in favor of Consultant, Consultant's officers, employees, affiliates, and subcontractors.
  - C. The Diversion Authority is not responsible for the payment of deductibles owed under Consultant's insurance policies.

D. The Diversion Authority reserves the right to enter into a program-wide insurance plan at its expense. Consultant agrees to participate in such a program if named as an insured party and if commercially reasonable terms are available.

30. LITIGATION ASSISTANCE. Services required or requested of Consultant by the Diversion Authority to support, prepare, document, bring, defend, or assist in litigation undertaken or defended by the Diversion Authority, except for suits or claims between the parties to this Agreement, will be defined in an authorized Task Order and reimbursed as mutually agreed.
31. INDEMNIFICATION. Consultant will defend, indemnify, and hold harmless the Diversion Authority and the State of North Dakota, and those parties' officers, employees, agents, consultants, subcontractors, and representatives, from and against any and all claims, losses, liabilities, damages, expenses, demands, suits, fines, judgments, costs, expenses, and fees (including all fees and charges of attorneys, engineers, architects, and other professionals and all court, arbitration, mediation, or other resolution costs) arising out of or relating to claims by third parties for property damage or bodily injury, including death, to the proportionate extent caused by any negligent act or omission of Consultant, any subcontractor, any supplier, or any individual or entity directly or indirectly employed by any of them to perform any of the work or anyone for whose acts any of them may be liable, and including all costs, expenses, and fees incurred by the Diversion Authority or the State of North Dakota in establishing and litigating the existence, scope, or any other matters relating to Consultant's obligations to defend, indemnify, and hold harmless. Consultant's obligations to defend will be free of any conflicts of interest, even if retention of separate legal counsel is necessary. Consultant's duties to defend, indemnify, and hold harmless include anything in excess of any minimum insurance requirements described in the contract documents, and anything in excess of any of Consultant's insurance policy limits. Consultant's obligations to defend, indemnify, and hold harmless will continue for a period of not less than six (6) years following completion of the Project or any termination or expiration of the contract documents.

The indemnified party shall provide notice to Consultant after obtaining knowledge of any claim that it may have pursuant to this Section 31. In the event the indemnified party pursues a claim pursuant to this Section, the indemnified party will also provide relevant information and assistance to Consultant.

32. LIMITATION OF LIABILITY. Notwithstanding any other provision of this Agreement, and to the fullest extent permitted by law, the total liability, in the aggregate, of Consultant and Consultant's officers, directors, members, partners, agents, guarantors, consultants, subconsultants, subcontractors, and employees, to Diversion Authority, its members and the State of North Dakota, and anyone else claiming by, through, or resulting from, or in any way related to the Project or Task Order, from any negligence, professional errors or omissions, strict liability, breach of contract, indemnity obligations, or warranty, express or implied, of Consultant or Consultant's officers, directors, members, partners, agents, consultants, subconsultants, subcontractors or employees shall not exceed the total amount, individually, collectively or in the aggregate shall not exceed the amount of two million

dollars (\$2,000,000). This Section takes precedence over any conflicting Section of this Agreement or any document incorporated into it or referenced by it. This limitation of liability will apply whether Consultant's liability arises under breach of contract or warranty; tort, including negligence, strict liability, statutory liability, or any other cause of action, and shall include Consultant's officers, affiliated corporations, employees, and subcontractors. Diversion Authority further agrees that its sole and exclusive remedy, and any claim, demand or suit arising from or related to the services under this Agreement shall be directed and/or asserted only against Consultant and not against any of Consultant's individual employees, officers, shareholders, affiliated firms or directors. The Diversion Authority knowingly waives all such claims against Consultant's individual employees, officers, shareholders, directors in their individual capacity or any affiliated companies to Consultant.

33. BREACH AND REMEDIES.

- A. A breach exists under this Agreement if either party:
  - (1) Makes a material misrepresentation in writing; or
  - (2) Fails or is unable to meet or perform any material promise in this Agreement, and
    - (a) Is incapable of curing the failure, or
    - (b) Does not cure the failure within twenty (20) days following notice (or within a longer period if specified in the notice).
- B. Consultant must give the Diversion Authority notice immediately if Consultant breaches, or if a third party claim or dispute is brought or threatened that alleges facts that would constitute a breach under this Agreement.
- C. The parties will use their Best Efforts to resolve amicably any dispute, including use of alternative dispute resolution options.
- D. All remedies provided for in this Agreement may be exercised individually or in combination with any other available remedy.

34. TERMINATION.

- A. Either party may terminate this Agreement, in whole or in part, for cause if either party fails substantially to perform through no fault of the other and does not commence correction of such nonperformance within twenty (20) days of written notice and diligently complete the correction thereafter.
- B. The Diversion Authority may terminate this Agreement, in whole or in part, or modify or limit Consultant's services, and proportionately, Consultant's compensation, if:
  - (1) The Diversion Authority determines that having Consultant provide services has become infeasible due to changes in applicable laws or regulations, or

- (2) Expected or actual funding to compensate Consultant is withdrawn, reduced, or limited.
- C. Either party may terminate this Agreement, in whole or in part, for any or no reason upon thirty (30) days' written notice.
- D. On termination, Consultant will be paid for all authorized services performed up to the termination date plus termination expenses, such as, but not limited to, reassignment of personnel, subcontract termination costs, and related closeout costs.
- E. In the event a federal or state tax or employment agency concludes that an independent contractor relationship does not exist, either Consultant or the Diversion Authority may terminate this Agreement immediately upon written notice.
- F. Upon receipt of any termination notice from the Diversion Authority related to any specific Task Order, Consultant must promptly discontinue all affected services under the Task Order unless the parties mutually agree otherwise.
- G. Upon the end date of the Agreement, which is the date when this Agreement as a whole, along with any pending Task Orders, expires or are terminated pursuant to their terms:
  - (1) The Diversion Authority will be released from compensating Consultant for services other than those Consultant satisfactorily performed prior to the end date.
  - (2) Consultant must submit Consultant's final invoice for payment within sixty (60) days of the end date. The Diversion Authority will not pay any Consultant invoice received after this period.
  - (3) Consultant will be released from performing services, except for services in any non-terminated portion of the Agreement.
- H. All rights and duties with respect to services performed prior to the expiration or termination of this Agreement, and continuing obligations specified in this Agreement to be performed following expiration or termination of this Agreement, will survive the expiration or termination of this Agreement.
- I. In the event of termination, expiration, or removal/withdrawal, Consultant must terminate its services as soon as it is reasonably possible to do so without (1) prejudice to the Diversion Authority's interests (or the interest of any person represented on the Diversion Authority's behalf) or (2) violation of Consultant's statutory or ethical duties. Consultant must notify the Diversion Authority of any further services, prior to withdrawal or substitution, which Consultant believes are necessary to avoid prejudice to the Diversion Authority's interests (or the interest of any person represented on the Diversion Authority's behalf), and obtain the Diversion Authority's consent prior to performing such services.



35. ADDITIONAL PAYMENT. Nothing contained in this Agreement shall obligate the Diversion Authority to make any payment for services rendered in any period after the termination of Consultant's retention by the Diversion Authority.
36. SUSPENSION, DELAY, OR INTERRUPTION OF WORK. The Diversion Authority may suspend, delay, or interrupt the Services of Consultant for the convenience of the Diversion Authority. In such event, Consultant's contract price and schedule shall be equitably adjusted.
37. NOTICE. Any notice or election required or permitted to be given or served by any party to this Agreement upon any other will be deemed given or served in accordance with the provisions of this Agreement if said notice or election is (1) delivered personally, or (2) mailed by United States certified mail, return receipt requested, postage prepaid and in any case properly addressed as follows:

If to Consultant:                                              Attn: \_\_\_\_\_  
                                                                                                  Crown Appraisals, Inc.  
                                                                                                  602 Front Street North  
                                                                                                  Barnesville, MN 56514-3118

If to Diversion Authority:                                              Attn: Chair  
                                                                                                  Metro Flood Diversion Authority  
                                                                                                  P.O. Box 2806  
                                                                                                  Fargo, ND 58108-2806

Each such mailed notice or communication will be deemed to have been given on the date that is three (3) days after the same is deposited in the United States mail. Each such delivered notice or communication will be deemed to have been given upon the delivery. Any party may change its address for service of notice in the manner specified in this Agreement.

38. PROHIBITION AGAINST ASSIGNMENT. This is a bilateral personal services Agreement. Neither party shall have the power to or will assign any of the duties or rights or any claim arising out of or related to this Agreement, whether arising in tort, contract, or otherwise, without the written consent of the other party. Any unauthorized assignment is void and unenforceable.
39. NO THIRD PARTY BENEFICIARIES. This Agreement gives no rights or benefits to anyone other than the Diversion Authority and Consultant and has no third-party beneficiaries.
40. CONSEQUENTIAL DAMAGES. To the maximum extent permitted by law, Consultant and Consultant's affiliated corporations, officers, employees, and subcontractors shall not be liable for the Diversion Authority's special, indirect, or consequential damages, whether such damages arise out of breach of contract or warranty, tort including negligence, strict or statutory liability, or any other cause of action. In order to protect Consultant against

indirect liability or third-party proceedings, the Diversion Authority will indemnify Consultant for any such damages.

41. MATERIALS AND SAMPLES. Any items, substances, materials, or samples removed from the Project site for testing, analysis, or other evaluation will be returned to the Project site within sixty (60) days of Project close-out unless agreed to otherwise. The Diversion Authority recognizes and agrees that Consultant is acting as a bailee and at no time assumes title to said items, substances, materials, or samples.
42. CONSULTANT'S DELIVERABLES. A party may rely on data or information that the party receives from the other party by hard copy or electronic media. When transferring documents in electronic media format, the transferring party makes no representations as to long-term compatibility, usability, or readability of such documents. Consultant's deliverables are for the Diversion Authority or others' convenience. Any conclusions or information derived or obtained from these files will be at user's sole risk.
43. ACCESS TO CONSULTANT'S ACCOUNTING RECORDS AND AUDIT RIGHTS.
  - A. Consultant must allow the Diversion Authority and its designees to review and audit Consultant's financial documents and records relating to this Agreement. Consultant will maintain accounting records, in accordance with generally accepted accounting principles. These records will be available to the Diversion Authority for a period of one (1) year after Consultant's final invoice for examination to the extent required to verify the direct costs (excluding established or standard allowances and rates) incurred hereunder. The Diversion Authority may only audit accounting records applicable to a cost-reimbursable type compensation. Upon finalization of the audit, the Diversion Authority will submit to Consultant a Notice of Audit Results and a copy of the audit report, which may supplement or modify any tentative findings verbally communicated to Consultant at the completion of an audit.
  - B. Within one hundred eighty (180) days after the date of the Notice of Audit Results, Consultant will respond, in writing, to the Diversion Authority indicating (a) whether it concurs with the audit report, (b) clearly explaining the nature and basis for any disagreement as to a disallowed item of expense, and (c) providing a written explanation as to any questioned or no opinion expressed item of expense ("Response"). The Response will be clearly stated and will provide any supporting documentation necessary to resolve any disagreement or questioned or no opinion expressed item of expense. Where the documentation is voluminous, Consultant may supply appropriate excerpts and make alternate arrangements to conveniently and reasonably make that documentation available for review by the Diversion Authority. The Response will refer to and apply the language of this Agreement. Consultant agrees that failure to submit a Response within the one hundred eighty (180) day period constitutes agreement with any disallowance of an item or expense and authorizes the Diversion Authority to finally disallow any items of questioned or no opinion expressed cost.

- C. The Diversion Authority will make its decision with regard to any Notice of Audit Results and Response within one hundred twenty (120) days after the date of the Response. If it is determined by a court of competent jurisdiction or by mutual agreement that an overpayment has been made to Consultant, Consultant will repay the amount to the Diversion Authority or reach an agreement with the Diversion Authority on a repayment schedule within thirty (30) days after the date of an invoice from the Diversion Authority. If Consultant fails to repay the overpayment or reach an agreement with the Diversion Authority on a repayment schedule within the thirty (30) day period, Consultant agrees that the Diversion Authority will deduct all or a portion of the overpayment from any funds then or thereafter payable by the Diversion Authority to Consultant for this project. Interest will be assessed on any partial payments or repayment schedules based on the unpaid balance at the end of each month until the balance is paid in full. The assessment of interest will begin thirty (30) days from the date of the invoice. The rate of interest will be the interest rate on judgments in North Dakota as calculated by the state court administrator pursuant to N.D.C.C. § 28-20-34. The rate of interest will be reviewed annually by the Diversion Authority and adjusted as necessary. Consultant expressly consents to this withholding or offsetting of funds under those circumstances, reserving the right to file a lawsuit to contest the Diversion Authority's decision.

44. OWNERSHIP. Ownership of work product and inventions created by Consultant shall be as follows:

- A. Pre-Existing Consultant Materials. The Diversion Authority acknowledges and agrees that in the performance of the services, Consultant will utilize its proprietary data, concepts, methods, techniques, processes, protocols, ideas, inventions, know-how, trade secrets, algorithm, software, works of authorship, software and hardware architecture, databases, tools, other background technologies and standards of judgment that developed or licensed from third parties prior to the effective date of this Agreement (the "Pre-Existing Consultant Materials") and that Consultant shall retain all right, title and interest, including intellectual property rights in the Pre-existing Consultant Materials. Subject to the terms and conditions of this Agreement, Consultant hereby grants to the Diversion Authority a non-exclusive, non-transferable, royalty-free license, fully assignable to the Diversion Authority's member entities, to utilize the Pre-Existing Consultant Materials for the purpose of the Diversion Authority's Project.
- B. Derivative Consultant Materials. The Diversion Authority acknowledges and agrees that in the performance of the services, Consultant will utilize and develop customization, enhancements, improvements, modifications and adaptations of and to the Pre-Existing Consultant Materials (the "Derivative Consultant Materials"). Consultant shall retain all right, title and interest, including intellectual property rights in the Derivative Consultant Materials. Subject to the terms and conditions of this Agreement, Consultant hereby grants to the Diversion Authority a non-exclusive, non-transferable, royalty-free license, fully assignable to the Diversion Authority's member entities, to utilize the Derivative Consultant Materials.

- C. New Consultant Materials. The Diversion Authority acknowledges and agrees that in the performance of the services, Consultant may utilize and develop new software, hardware and other technology or processes that do not utilize or incorporate, or are not based upon, the Pre-Existing Consultant Materials (“New Consultant Materials”). Between the parties, subject to the license grant-back set forth below, the Diversion Authority will retain all right, title and interest, including without limitation intellectual property rights, in and to the New Consultant Materials. The Diversion Authority shall have the full ownership of such New Consultant Materials without any limitation or restriction.
- D. License Grant Back. Subject to the terms and conditions of the Agreement, the Diversion Authority hereby grants to Consultant a non-exclusive, transferable, royalty-free license to utilize the concepts, methods, techniques, processes, protocols, ideas, inventions, know-how, trade secrets, algorithm, software and hardware architecture, and other background technologies that are newly developed by Consultant under the Agreement and assigned to the Diversion Authority under this Agreement, to make, have made, use, reproduce, license, display, perform, distribute, sell, offer for sale, service, support, import, and otherwise disposed of any products, technologies, and services and for any purposes without restriction.
- E. License Restrictions. Except as otherwise permitted above, the Diversion Authority and its member entities shall not, and shall not allow any third party to: (i) modify or otherwise create derivative works of the Pre-Existing Consultant Materials; (ii) use the Pre-Existing Consultant Materials for any other purpose, other than the Diversion Authority’s Project; (iii) make, have made, use, reproduce, license, display, perform, distribute, sell, offer for sale, service, support, or import any product that incorporates, embodies and/or is based upon the Pre-Existing Consultant Materials; (iv) sublicense, distribute or otherwise transfer to a third party any of the Pre-Existing Consultant Materials by itself or as incorporated in the services; or (v) reverse engineer, disassemble, decompile or attempt to derive the source code or underlying ideas or algorithms of the Pre-Existing Consultant Materials. Any additional use of the Pre-Existing Consultant Materials shall require a separate written license agreement.
- F. Miscellaneous. Nothing contained in this Agreement shall be construed as conferring to the Diversion Authority or any third party any license or right by implication, estoppel or otherwise to any intellectual property rights of Consultant, other than the rights expressly granted under this Agreement. The Diversion Authority and its member entities may use said work products for the specific purpose for which the work product was intended. Any other use or reuse, without written verification or adaptation by Consultant will be at the user’s sole risk.
- G. Diversion Authority Material. As between the parties, the Diversion Authority is the exclusive owner of all material Consultant collects from the Diversion Authority in connection with the services under this Agreement, including copyrights. Within thirty (30) days of the end date of the Agreement, or upon the Diversion Authority’s notice

at any time, Consultant must give all materials collected to the Diversion Authority (or to another party at the Diversion Authority's direction). Unless the Diversion Authority specifies otherwise, all files must be saved in Microsoft Word and Excel formats, as applicable. Consultant must maintain Consultant's records relating to services under this Agreement and Consultant's invoices, and all other materials, in an accessible location and condition for a period of not less than one (1) year after the later of:

- (1) The date when Consultant receives final payment under this Agreement; or
- (2) The date when the Diversion Authority resolves with Consultant the findings of any final audit.

Consultant may retain copies of any original documents Consultant provides to the Diversion Authority and a copy of any material collected from the Diversion Authority in Consultant's confidential files for the purpose of complying with applicable laws or established company procedure regarding the preservation of business records.

45. REUSE OF PROJECT DOCUMENTS. Services and deliverables are for the exclusive use of the Diversion Authority and are not to be relied upon by third parties. All reports, drawings, specifications, documents, and other deliverables of Consultant, whether in hard copy or in electronic form, are Instruments of Service for this Project, whether the Project is completed or not. Upon full payment for services due under this Agreement, Consultant agrees to grant to the Diversion Authority an irrevocable license to the Instruments of Service, the Diversion Authority agrees to indemnify Consultant and Consultant's officers, employees, subcontractors, and affiliated corporations from all claims, damages, losses, and costs, including, but not limited to, litigation expenses and attorney's fees arising out of or related to the Diversion Authority's related entities' unauthorized reuse, change or alteration of these Project documents. Nothing in this Agreement shall constitute a waiver of the statutory limits of liability set forth in N.D.C.C. § 32-12.1-03 or a waiver of any available immunities or defenses.

46. CONFIDENTIAL INFORMATION AND PUBLICITY.

A. Consultant agrees to hold in confidence the following confidential information:

- (1) All information that the Diversion Authority discloses to Consultant; and
- (2) All information to which Consultant gains access while providing services under this Agreement.

B. Confidential information does not include any information that Consultant can demonstrate has been made available to the public (other than through a breach of this Agreement). As between Consultant and the Diversion Authority, the Diversion

Authority owns the confidential information, and the Diversion Authority authorizes Consultant to use it only for purposes of performing this Agreement. Consultant may also disclose the Diversion Authority's confidential information to the extent necessary to comply with law, provided Consultant gives the Diversion Authority prior written notice. Upon the end date of this Agreement, Consultant must destroy or return all confidential information to the Diversion Authority, at the Diversion Authority's discretion, and certify to the Diversion Authority, in writing, that it has done so; provided, however, such destruction shall include, without limitation, the process of expunging, to the extent reasonably practicable, all such confidential information from any computer, hard drive, word processor, server, backup tape, or other electronic device containing such confidential information. Notwithstanding the foregoing, Consultant may retain one (1) archival copy of the confidential information in its confidential files for the purpose of complying with applicable laws or established company procedure regarding the preservation of business records.

- C. Consultant must not make any public announcement, press release, or other writing relating to the services under this Agreement without the Diversion Authority's prior written approval.
  - D. Consultant understands a breach under this Section may result in irreparable damage for which no adequate remedy may be available. Accordingly, injunctive relief and other equitable relief are remedies available to the Diversion Authority.
47. ENTIRE AGREEMENT; MODIFICATION. This Agreement, including its attachments and schedules, constitutes the entire Agreement, supersedes all prior written or oral understandings, and may only be changed by a written amendment approved by the Diversion Authority and executed by Consultant and the Chair of the Diversion Authority on behalf of the Diversion Authority. The following attachment is hereby made a part of this Agreement: (1) **Exhibit A** – General Scope of Services. This Agreement may be modified as to terms and conditions from time to time upon the mutual consent of the parties; however, such modification shall be reduced to writing, signed by the parties and the document appended to and made a part of this Agreement.
48. FORCE MAJEURE. Consultant is not responsible for damages or delay in performance caused by acts of God, strikes, lockouts, accidents, or other events beyond the control of Consultant. In any such event, Consultant's contract price and schedule shall be equitably adjusted.
49. WAIVER. A party's waiver of enforcement of any of this Agreement's terms or conditions will be effective only if it is in writing. A party's specific waiver will not constitute a waiver by that party of any earlier, concurrent, or later breach or default.

The Diversion Authority waives all claims against Consultant, including those for latent defects, which are not brought within six (6) years of substantial completion of the facility designed or final payment to Consultant, whichever is earlier.

50. BINDING EFFECT. This Agreement shall be binding upon and inure to the benefit of the Diversion Authority, its successors and assigns, and any such successor shall be deemed substituted for the Diversion Authority under the terms of this Agreement. This Agreement shall likewise be binding upon Consultant, its successors and assigns. As used in this Agreement, the term “successor” shall include any person, firm, corporation or other business entity which at any time whether by merger, purchase or otherwise acquires all or substantially all of the assets or business of the corporation.
51. NEGOTIATED AGREEMENT. This Agreement has been arrived at through negotiation between the parties.
52. INTEGRATED SERVICES. Notwithstanding anything in the Agreement to the contrary, the parties recognize and support the integrated nature of the Project team in the performance and delivery of professional services by Consultant. This Agreement, and particularly the contractual risk allocation and liability provisions, shall be interpreted and applied, and the professional accountability determined in such a manner that the integrated nature, shared control of the service performance, and joint decision making roles of the parties and Consultant’s role as agent for the Diversion Authority shall be given due and full consideration. Further, the parties agree to re-visit this Agreement, if necessary, to better reflect the parties’ changing roles on the Project, and any changes in Consultant’s role as the Project proceeds.
53. SEVERABILITY AND SURVIVAL. If any court of competent jurisdiction declares, for any reason, any provision or part of this Agreement to be invalid, illegal, or unenforceable, all remaining terms and provisions of this Agreement will remain binding and enforceable. Limitations of liability, indemnities, and other express representations shall survive termination of this Agreement for any cause.
54. WAIVER OF JURY TRIAL. THE PARTIES HEREBY KNOWINGLY, IRREVOCABLY, VOLUNTARILY AND INTENTIONALLY WAIVE ANY RIGHTS THAT THEY MAY HAVE TO A TRIAL BY JURY WITH RESPECT TO ANY ACTION, PROCEEDING, COUNTERCLAIM OR DEFENSE BASED ON THIS AGREEMENT, OR ARISING OUT OF, UNDER OR IN ANY CONNECTION WITH THIS AGREEMENT, OR WITH RESPECT TO ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENTS (WHETHER ORAL OR WRITTEN) OR ACTIONS OF ANY PARTY HERETO RELATING TO THIS AGREEMENT. THIS PROVISION IS A MATERIAL INDUCEMENT FOR ALL PARTIES ENTERING INTO THIS AGREEMENT. THIS PROVISION APPLIES ONLY TO SUITS BETWEEN THE PARTIES ARISING OUT OF OR RELATED TO THIS AGREEMENT AND DOES NOT APPLY TO THIRD PARTY CLAIMS OR SUITS BY OR ON BEHALF OF THE PARTIES FOR PROJECT PROPERTY ACQUISITION AND/OR CONTRACT CLAIMS AND DEFENSES.
55. DISPUTE RESOLUTION. The Diversion Authority and Consultant shall endeavor to resolve claims, disputes and other matters in question between them by non-binding

mediation, which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association. A request for non-mediation shall be made in writing, delivered to the other party to the Agreement, and filed with the person or entity administering the mediation. The request may be made concurrently with the filing of a complaint or other appropriate demand for binding dispute resolution but, in such event, mediation shall proceed in advance of non-binding dispute resolution proceedings, which shall be stayed pending mediation for a period of sixty (60) days from the date of filing, unless stayed for a longer period by agreement of the parties or court order.

The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in the place where the Project is located, unless another location is mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

If the parties do not resolve a dispute through non-binding mediation pursuant to this Section, then the method of binding dispute resolution shall be via formal claims filed in a court of competent jurisdiction.

56. CONTROLLING LAW AND VENUE. This Agreement, its interpretation and performance, and any other claims related to it shall be controlled by the laws of the state where the services or work was provided, and any action brought as a result of any claim, demand or cause of action arising under the terms of this Agreement shall be brought in a court of competent jurisdiction within the state where the services or work were provided.

This Agreement is executed the day and year above noted.

*[Signatures appear on the following pages.]*



DIVERSION AUTHORITY:

Metro Flood Diversion Authority

By: \_\_\_\_\_  
Timothy J. Mahoney, Chair  
Diversion Authority Board

By: \_\_\_\_\_  
Michael J. Redlinger, Co-Executive Director  
Metro Flood Diversion Authority

DRAFT

CONSULTANT:

Crown Appraisals, Inc.

By: \_\_\_\_\_  
\_\_\_\_\_, President

DRAFT

**Fargo - Moorhead Diversion Authority  
Consultant's Role\***

**Exhibit A – Task Order 1 - General Scope of Services**

**See Task Order No. 1, Amendment 0 for description of services**

\* Consultant will coordinate and cooperate in Good Faith with the Authority's Project Management Consultant.

DRAFT

Crown Appraisals, Inc.

# Task Order No. 1, Amendment 0

MFDA Purchase Order No. \_\_\_\_\_

## Flowage Easements Valuation

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In accordance with the Master Agreement for Professional Services between **Metro Flood Diversion Authority** ("Owner") and **Crown Appraisals, Inc.** ("Consultant"), dated December 21, 2017 ("Agreement"), Owner and Consultant agree as follows:

The parties agree that in the event of a conflict between prior versions of this Task Order No. 1 and this Amendment, the terms and conditions in this Amendment shall prevail, provided however, nothing herein shall preclude Consultant from invoicing for work authorized under prior versions of this Task Order and performed prior to effective date of this Amendment, even to the extent such prior work was revised by this Amendment. All other terms and conditions shall remain the same and are hereby ratified and affirmed by the parties.

### 1. Specific Project Data

#### A. Title: **Flowage Easements Valuation**

- B. Background: The Fargo-Moorhead Area Flood Diversion Project (Project) requires retention of flood waters within a staging area upstream of the metro area during extreme events. The upstream retention of flood waters is necessary to mitigate downstream impacts from operation of the Project. The Diversion Authority is required to mitigate the impacts of upstream flood water retention. Part of the mitigation includes purchasing permanent flowage easements for the right to periodically and temporarily store water on the land in the upstream mitigation area.

The Diversion Authority recognizes that establishing an appropriate value for the flowage easements is a complex and important task. The Diversion Authority also recognizes that the exact location of the upstream mitigation area will be defined upon further detailed technical analysis, hydraulic modeling, and permitting for changes to the Project resulting from the Flood Diversion Task Force established by the Governors' of Minnesota and North Dakota. In recognition of these considerations, the Diversion Authority believes it is prudent to start the process of valuing flowage easements by authorizing Consultant to conduct Phase 1 of the flowage easements valuation services.

- C. Summary of Services: In order to define the value of the easements, the services of a qualified appraiser are required to research and evaluate data and produce a valuation of the easements. The appraiser (Consultant) will use a phased approach, as directed by the Diversion Authority, to accomplish this. Phase 1 of the flowage easement analysis includes developing a regression analysis model, and a matched pairs analysis utilizing sales of easement encumbered and unencumbered properties in representative markets from across the country. The model will provide flexibility to compute the diminution in value of encumbered properties. It is expected that the exact location, boundaries, and operation of the upstream mitigation area will be determined through detailed technical analysis, hydraulic modeling, and permitting. Commencing with Phase 1 now will allow the data gathering and regression model development to proceed in a parallel timeframe to the technical hydraulic modeling.

Under future phases of the flowage easements valuation, the regression analysis model will allow the Diversion Authority and Consultant to provide a valuation unique to each parcel and the associated impacts and severity of the impacts that the operation of the Project would have specifically to each parcel contained within the upstream mitigation area, once the exact bounds of the upstream mitigation area has been identified when the staging area is used.

## 2. Services of Consultant

### A. Phase 1 – Flowage Easements Valuation

- I. Participate in a kick-off coordination meeting with Diversion Authority technical team, Program Management Consultant, and NDSU agribusiness research team.
- II. Phase 1 includes both the basic regression analysis and the matched pairs analysis.
  - i. Acquire/purchase/research/analyze sales of flowage or similar easement encumbered and unencumbered properties across the country for use in identifying the range of land value diminution that is associated with flowage easements.
  - ii. This process may result in geographically targeted or localized regression analyses being performed in numerous locations across the country.
  - iii. Through the analyses performed, both a (1) hard dollar value differential and (2) a percentage differential may be indicated. The hard dollar difference may not be applicable to the local Fargo-Moorhead metro area market, but the percentage difference may likely be applicable to values in the Fargo-Moorhead metro area market.
  - iv. Research may identify several different property types (various surface land uses) that are affected by the flowage (or similar) easements—tillable, wooded, commercial, industrial, transitional development land, etc. Greater confidence can be placed on an analysis where more matched pairs of varying land uses are available.
- III. Severity of flowage easements experienced by various property types will be measured by the data analyzed in both the matched pairs analysis and the regression analysis.
- IV. Development of the regression analysis will be a useful valuation tool for the Consultant to compute potential flowage easement acquisition costs across multiple future staging areas.
- V. The matched pair analysis and the regression model will consider the following potential impacts to land from the periodic and temporary retention of flood waters, including:
  - i. Delay in planting due to storage of water in the retention area
  - ii. Failure to plant crop due to storage of water in the retention area
  - iii. Reduction of yield from crops due to storage of water in the retention area
  - iv. Restrictions on ability to develop land or add structures due to its presence in a new 100-year floodway or floodplain, which didn't exist prior to the project
  - v. Actual impacts should be determined based on published material, information gathered from experts in applicable areas of expertise, and on statistical frequency and duration of the projected operation of the project
- VI. Land characteristics that affect parcel value may include:
  - i. Productivity
  - ii. Soil Type
  - iii. Drainage/alkalinity
  - iv. Location
  - v. Existing flood risk
  - vi. Size and shape of parcel relative to current farming practices & equipment size
  - vii. Development potential

VII. Requirements

- i. Appraisers—See MSA
- ii. Valuation documents prepared as a result of the analysis completed will be USPAP compliant.

VIII. Phase 1 deliverables:

- i. Matched pairs analysis
    - a. Isolated sets of matched pairs for various property types will enable the Consultant to establish the degree of diminution for each surface land use potentially affected by the Fargo-Moorhead Diversion project
  - ii. Regression analysis model
    - a. Consultant will provide a brief summary expressing a range of potential diminution rates for various property types, allowing the Owner to estimate acquisition costs for flowage easement areas being considered by the Diversion Authority.
  - iii. Consultant will produce a detailed report providing an explanation of models and results of the matched pairs analysis and of the regression analysis.
  - iv. Consultant will produce sample easement valuation reports for three (3) parcels owned by the Diversion Authority.
  - v. Per MSA Section 34 D, a minimum termination fee of \$50,000 will be paid if Phase 1 is terminated during Phase 1 by the Owner. If Phase 1 is completed and then Phase 2 is cancelled, a termination fee of \$50,000 will be due and payable to Consultant.
- B. Anticipated Future Work (Phase 2): It is anticipated that a future Phase 2 of the flowage easements valuation will include applying the regression analysis model developed in Phase 1 to the specific parcels within the upstream staging area for the revised Project. When the revised upstream mitigation area is fully defined with the depth, duration, and frequency of water retention, parcel specific valuation reports will be generated to support the acquisition of easements. It should be noted that in order to complete Phase 2, the Owner will need to provide Consultant with updated hydraulic model information (depth, duration, and frequency of water in the upstream mitigation area) and ag impact model information from an updated NDSU agribusiness report.
- C. Potential Future Services: If required, potential future services from Consultant may include the production of more detailed appraisal reports for individual parcels to support eminent domain actions, if necessary. This service will be performed at an additional cost. Cost will depend on the level of service requested.
3. Owner's Responsibilities.
- A. Owner shall have those responsibilities set forth in the Agreement.
4. Times for Rendering Services
- A. Initial kick-off meeting shall be held in January 2018
  - B. Project update meetings shall be held approximately every two months during study
  - C. Delivery of the final Phase 1 report shall be **August 31, 2018**.
5. Payments to Consultant
- A. Owner shall pay Consultant for services rendered as follows:
    - I. Phase 1 services outlined above at a cost of \$500,000 inclusive of all expenses.

- II. A \$100,000 retainer is requested upon acceptance of this proposal. Payment should not be made until after January 1, 2018.
  - III. Per MSA Section 14, monthly invoices will be submitted to the Owner.
  - IV. Final payment of the remaining \$200,000 balance will be due upon submission of the final report.
  - V. The total compensation for services identified under the Task Order is defined in the table below.
- B. Consultant shall notify Owner of any out of scope work requested that may result in exceeding the contract amount.
  - C. Consultant will notify Owner when 80 percent of the budget is expended.
  - D. Consultant will submit an amendment for additional compensation when 90 percent of the budget is expended, or confirm to Owner that this Task Order can be completed for the remaining budget.
  - E. Consultant will not perform work beyond 100 percent of the budget for Task Order No. 1 without Owner's authorization by an amendment to this Task Order or Authorized Work Directive.
  - F. The estimated fee for Phase 2 is \$250,000. This fee is based on several assumptions, including (1) production of 3-4 page summary reports for each parcel or ownership group, (2) detailed property inspection visits will not be required, (3) property owner visits will not be required, (4) a reasonable timeframe is allowed to produce the valuation reports, and (5) reporting is based on larger land units as the data allows—not limited to reporting based on assessors parcel numbers. Phase 2 services would be authorized via an amendment. The Phase 2 fee would cover completion of the project in which market value opinions are formed for individual properties within the final staging area that is authorized for the Diversion project. The final fees for Phase 2 will be dependent on the number of reports to be issued, any changes to the assumptions noted above, and the level of reporting detail desired.

<b>Flowage Easements Valuation</b>	<b>Activity ID</b>	<b>Current Budget (\$)</b>	<b>Change (\$)</b>	<b>Revised Budget (\$)</b>
Regression Analysis Model (Phase 1)		\$500,000		
<b>TOTAL</b>		<b>\$500,000</b>		

- G. The terms of payment are set forth in Paragraph 15 of the Agreement.

- 6. Subconsultants: Refer to MSA
- 7. Other Modifications to Agreement: None
- 8. Attachments: None
- 9. Documents Incorporated By Reference: None

10. Terms and Conditions: Execution of this Task Order by Owner and Engineer shall make it subject to the terms and conditions of the Agreement (as modified above), which Agreement is incorporated by this reference. Consultant is authorized to begin performance upon its receipt of a copy of this Task Order signed by Owner.

The Effective Date of this Task Order is December 21, 2017.

**CONSULTANT:**

**Crown Appraisals, Inc.**

Signature \_\_\_\_\_ Date \_\_\_\_\_

**Jeffrey Berg**

Name

**Owner**

Title

**DESIGNATED REPRESENTATIVE FOR TASK ORDER:**

**Jeffrey Berg**

Name

**Owner**

Title

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Barnesville, MN 56514-3118

Address

[jeffberg@crownappraisalsinc.com](mailto:jeffberg@crownappraisalsinc.com)

E-Mail Address

(218) 354-7000

Phone

**OWNER:**

**Fargo-Moorhead Metro Diversion Authority**

Signature \_\_\_\_\_ Date \_\_\_\_\_

**Tim Mahoney**

Name

**Chairman, Flood Diversion Board of Authority**

Title

**DESIGNATED REPRESENTATIVE FOR TASK ORDER:**

**Michael J. Redlinger**

Name

**City of Fargo, Assistant City Administrator**

Title

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