



## Engineering Department

**DATE:** May 14, 2024

**FROM:** Gabe Schell, City Engineer

**ITEM:** South Bismarck Flood Control

**REQUEST:**

Consider approval of the cost share reimbursement agreement with the State Water Commission relating to the South Bismarck Flood Control Project and Amendment 2 with Apex Engineering Group, Inc relating to the South Bismarck Flood Control Project.

**BACKGROUND INFORMATION:**

The City of Bismarck has received approval from the State Water Commission to cost share in the design engineering costs associated with the south Bismarck Flood Control Project. This project is also eligible for Federal Emergency Management Agency (FEMA) for design and construction cost share. Costs incurred by the City after the State Water Commission approval on April 11, 2024 are eligible for cost share.

The cost share agreement includes requirements for the subcontractors working on behalf of the City. Amendment 2 with Apex Engineering Group, Inc. incorporates those requirements into our current design contract.

**RECOMMENDED CITY COMMISSION ACTION:**

Approve the cost share reimbursement agreement with the State Water Commission relating to the South Bismarck Flood Control Project and Amendment 2 with Apex Engineering Group, Inc relating to the South Bismarck Flood Control Project.

**STAFF CONTACT INFORMATION:**

Gabe Schell, City Engineer, 701-355-1507, [gschell@bismarcknd.gov](mailto:gschell@bismarcknd.gov)

**ATTACHMENTS:**

1. State Water Commission Agreement
2. Apex Engineering Amendment 2

**Agreement for Cost-Share Reimbursement  
City of Bismarck  
South Bismarck Flood Control- Preconstruction**

**1. PARTIES.** This agreement is between the State of North Dakota (State), by and through the State Water Commission (Commission), and the City of Bismarck (Sponsor).

**2. PROJECT DESCRIPTION AND LOCATION.** Sponsor is seeking funding for preconstruction costs associated with engineering design of flood risk measures that will provide FEMA-accredited flood protection (Project). Project is in the City of Bismarck, North Dakota.

**3. COMMISSION'S RESPONSIBILITY AND INTENT.** Commission will provide Sponsor with cost-share, not to exceed \$2,369,298, as approved by Commission on April 11, 2024, to reimburse 60 percent of the actual eligible costs incurred in Project. Commission cost-share is contingent on availability of funds and conditions of this agreement. Commission's intent in providing this funding to Sponsor is to assist Sponsor financially with Project costs. Sponsor retains sole and absolute discretion in the manner and means of carrying out Project, except to the extent specified in this agreement.

**4. SPONSOR'S RESPONSIBILITIES.** Sponsor must:

- a. Complete Project.
- b. Provide continued maintenance for Project.
- c. Ensure all applicable permits (federal, state, and local) are obtained.
- d. Acquire all title to land and easements for Project.
- e. Comply with all North Dakota laws governing the requirements for competitive bids, advertising, and awarding of contracts for construction of Project.
- f. Maintain a Project file containing relevant documents and correspondence generated during the course of Project. Commission is not responsible for maintaining a Project file.
- g. Provide a progress report to Commission at least every four years if the term of Project exceeds four years.
- h. Notify Commission of any changes to Project funding, including additional funding or funding sources. Cost-share may be modified based on the revised local share.
- i. Prior to signature, inform Commission and any other relevant party regarding Project of any errors, misinterpretations, changes, modifications, miscalculations, incorrect Project descriptions, or any other information stated herein that is inaccurate.

- j. Notify Commission of litigation related to Project. If Project becomes the subject of litigation before all funds have been disbursed, the Secretary may withhold funds until the litigation is concluded.

**5. ELIGIBLE COSTS.** Commission has sole discretion to determine eligible costs and availability of Commission funds. Additional information is outlined in Commission's cost-share policy. Commission will not cost-share in litigation costs unless there has been a separate authorization.

**6. PAYMENT.** Commission will make partial payments upon receipt and approval of Sponsor's written request. Sponsor must provide Commission verification of actual costs and a Project status report with each payment request. A Commission representative may inspect Project to determine whether the work satisfies Commission's cost share requirements before Commission makes payment(s) to Sponsor. Request for final payment must include verification of Project completion as requested by Commission.

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

**8. INSURANCE.** Sponsor must secure and keep in force during the term of this agreement, from an insurance company, government self-insurance pool, or government self-retention fund authorized to do business in North Dakota, commercial general liability with minimum limits of liability of \$500,000 per person and \$2,000,000 per occurrence.

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

- a. Commercial general liability, including premises or operations, contractual, and products or completed operations coverages (if applicable), with minimum liability limits of \$2,000,000 per occurrence.
- b. Automobile liability, including Owned (if any), Hired, and Non-owned

automobiles, with minimum liability limits of \$500,000 per person and \$2,000,000 per occurrence.

- c. Workers' compensation coverage meeting all statutory requirements. The policy must provide coverage for all states of operation that apply to the performance of this contract.
- d. If subcontractor is domiciled outside State, employer's liability or "stop gap" insurance of not less than \$2,000,000 as an endorsement on the workers' compensation or commercial general liability insurance.

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

- e. Any deductible or other similar obligation under the policies is the sole responsibility of the subcontractor. The amount of any deductible is subject to approval by State.
- f. This insurance may be in policy or policies of insurance, primary and excess, including the so-called umbrella or catastrophe form and must be placed with insurers rated "A-" or better by A.M. Best Company, Inc., provided any excess policy follows form for coverage. Less than an "A-" rating must be approved by the State. The policies must be in form and terms approved by the State.
- g. State will be defended, indemnified, and held harmless to the full extent of any coverage actually secured by the subcontractor in excess of the minimum requirements set forth above. The duty to defend, indemnify, and hold harmless State under this agreement is not limited by the insurance required in this agreement.
- h. State must be endorsed on the commercial general liability policy, including any excess policies, as additional insured. State must have all the benefits, rights, and coverages of an additional insured under these policies that are not limited to the minimum limits of insurance required by this agreement or by the contractual indemnity obligations of Sponsor.
- i. The insurance required in this agreement, through a policy or endorsement, must include:
  - (1) A "Waiver of Subrogation" waiving any right to recover the insurance company may have against State;
  - (2) A provision that subcontractor's insurance coverage is primary (i.e., pay first) as respects any insurance, self-insurance, or self-retention maintained by State and that any insurance, self-insurance, or self-retention maintained by State must be in excess of the subcontractor's insurance and must not contribute with it;
  - (3) Cross liability/severability of interest for all policies and endorsements;
  - (4) The legal defense provided to State under the policy and any endorsements must be free of any conflicts of interest, even if retention of separate legal counsel for State is necessary;

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

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

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

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

**11. TERMINATION.**

a. Commission may terminate this agreement effective upon delivery of written notice to Sponsor, or a later date as may be stated in the notice, under any of the following conditions:

- (1) If Commission determines an emergency exists.
- (2) If funding from federal, state, or other sources is not obtained and continued at levels sufficient to provide the funds necessary to comply with this agreement. The parties may modify this agreement to accommodate a reduction in funds.
- (3) If federal or state laws or rules are modified or interpreted in a way that the services are no longer allowable or appropriate for purchase under this agreement or are no longer eligible for the funding proposed for payments authorized by this agreement.
- (4) If any license, permit, or certificate required by law, rule, or this agreement is denied, revoked, suspended, or not renewed.
- (5) If Sponsor does not submit a timely progress report under 3.(g.), or the Commission determines after reviewing a progress report that Project has not made sufficient progress.
- (6) If Commission determines that continuing the agreement is no longer necessary or would not produce beneficial results commensurate with the further expenditure of public funds.

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

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

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

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

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

**15. NONDISCRIMINATION.** Sponsor agrees to comply with Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), N.D.C.C. title 34, and all applicable federal and state laws, rules, and policies relating to nondiscrimination, accessibility, and civil rights.

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

**NORTH DAKOTA STATE WATER COMMISSION**

By:



ANDREA TRAVNICEK, PH.D.

Secretary

Date: 04/21/2024

**CITY OF BISMARCK**

By:

MICHAEL SCHMITZ

Mayor

Date: \_\_\_\_\_

This is **EXHIBIT K**, consisting of 2 pages, referred to in and part of the **Agreement between Owner and Engineer for Professional Services** dated November 9, 2021.

**AMENDMENT TO OWNER-ENGINEER AGREEMENT**  
**Amendment No. 2**

**The Effective Date of this Amendment is: May 14, 2024.**

Background Data

Effective Date of Owner-Engineer Agreement: November 9, 2021

Owner: City of Bismarck, ND

Engineer: Apex Engineering Group, Inc.

Project: South Bismarck Flood Control Project

Nature of Amendment:

- Modifications to services of Engineer
- Modifications of payment to Engineer
- Modifications to time(s) for rendering services
- Modifications to other terms and conditions

Description of Modifications:

The terms of the 'Agreement for Cost-Share Reimbursement' between the State of North Dakota and the City of Bismarck (**Attachment 1**) that apply to the Engineer shall be incorporated into the Agreement.

Agreement Summary:

Original agreement amount:	\$ <u>407,400</u>
Net change for prior amendments:	\$ <u>1,100,874</u>
This amendment amount:	\$ <u>0</u>
Adjusted Agreement amount:	\$ <u>1,508,274</u>

The foregoing Agreement Summary is for reference only and does not alter the terms of the Agreement, including those set forth in Exhibit C.

Owner and Engineer hereby agree to modify the above-referenced Agreement as set forth in this Amendment. All provisions of the Agreement not modified by this or previous Amendments remain in effect.

OWNER:

ENGINEER:

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By: \_\_\_\_\_  
Print name: \_\_\_\_\_

By: \_\_\_\_\_  
Print name: Mike Berg

Title: \_\_\_\_\_

Title: Vice President / Principal

Date Signed: \_\_\_\_\_

Date Signed: \_\_\_\_\_

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**NORTH DAKOTA STATE WATER COMMISSION**

By:



ANDREA TRAVNICEK, PH.D.

Secretary

Date: 04/21/2024

**CITY OF BISMARCK**

By:

MICHAEL SCHMITZ

Mayor

Date: \_\_\_\_\_