Memorandum of Agreement
Between the Municipality of Anchorage
& the Alaska Department of Transportation & Public Facilities
For Spenard Road Rehabilitation
(AKDOT&PF Project #CFHWY00604/Federal #0001659)
(CITY Project #19-16)

I. INTRODUCTION

The Alaska Department of Transportation and Public Facilities (DOT&PF) and Municipality of Anchorage (CITY), an Alaska municipality, mutually agree to the terms and conditions of this Memorandum of Agreement (MOA). Alaska Statute 44.42.020 authorizes DOT&PF to cooperate, coordinate, and enter into agreements with the federal government and municipalities to plan, design, and construct transportation facilities. The Spenard Road Rehabilitation, Minnesota Drive to Benson Boulevard project (PROJECT) was included in the Anchorage Metropolitan Area Transportation Solutions (AMATS) 2019-2022 Transportation Improvement Program, which is incorporated into the DOT&PF 2018-2021 Statewide Transportation Improvement Program (STIP).

This MOA is being executed to facilitate the planning, design and construction of the PROJECT. Federal Highway Administration (FHWA) funding will participate in the PROJECT. The CITY agrees to 9.03% for the cost of the federal-aid eligible work and 100% of the work ineligible for federal-aid participation. By agreeing to this MOA, The CITY authorizes the DOT&PF to plan, design, and construct the PROJECT.

II. PROJECT SCOPE:

The scope of the PROJECT is to plan, design, and construct Spenard Road, generally from Minnesota Drive to Benson Boulevard. Project will rehabilitate the corridor to improve traffic flow. This project will also include non-motorized improvements.

Both CITY and DOT&PF (the Parties) will review and approve the PROJECT budgets. The PROJECT budgets are estimates only, and the Parties recognize and acknowledge that actual costs may exceed the original estimated budgets.

III. PLANNING, DESIGN, CONSTRUCTION, AND OWNERSHIP OF THE PROJECT AND IMPROVEMENTS

A. Project Developed in Stages or Phases

The PROJECT will be broken down into four phases (preliminary engineering, right-of-way certification, utility agreements, and construction). The PROJECT will require that each of the four phases receive appropriate federal authorization before work may proceed.

DOT&PF Policy and Procedure numbered 09.01.040 (Local Match for CIP) requires a minimum of 15% contingency to be included with the total cost estimate for each project ("adjusted total cost estimate"). Accordingly, DOT&PF will not seek a federal authorization to proceed with a phase of the PROJECT prior to the CITY's transfer of the local match fund requirement for the adjusted total cost estimate for each phase. For the PROJECT, the CITY is required to transfer 9.03% of the adjusted total cost estimate for each phase. Unspent contingency funds from any completed phase will be applied to the required contingency amount for subsequent phases. DOT&PF will provide the amount of said contingency funds within 90 days of Federal Funding de-obligation completion for the last phase of the project.

Upon completion and final closeout of the PROJECT, if the final cost is less than the programmed amount, the CITY contribution will be recalculated and any excess CITY contribution will be refunded to the CITY.

B. DOT&PF's Responsibilities

DOT&PF shall:

1. Ensure that the FHWA funds used for the PROJECT are expended in accordance with Federal and State laws and regulations.
2. Plan, design, and construct the PROJECT. The PROJECT is located within the bounds of the Municipality and within the municipal right of way and the design shall be in accordance with the following references, as applicable:
    a. Municipality of Anchorage Design Criteria Manual (DCM)

b. Municipality of Anchorage Drainage Design Guidelines (DDG)

c. Minor incorporations of the Municipality of Anchorage Standard Specifications (MASS), as appropriate

d. Anchorage Municipal Code Chapter 7.40 Funds for Works of Art in Public Facilities; AO No. 2019-127 Amendment includes road classified as collector or greater in the Official Streets and Highways Plan.

3. Acquire all necessary rights of way and quit claim ownership to the CITY.
4. Include the PROJECT in the State capital budgeting process as a component of the TIP/STIP, contingent on the CITY fulfilling its funding obligations contained herein, and obtain Legislative authority to spend the funding.
5. Obtain NEPA documentation as needed, and keep an interested parties list.
6. Develop Requests for Proposals ("RFPs") and enter into contracts for engineering and environmental services to develop the PROJECT. The RFPs shall be submitted to the CITY for comment prior to advertising for proposals. It is anticipated that a majority of the design engineering and environmental services will be completed through professional service contracts.
7. Execute and manage any professional services agreements as necessary.
8. Keep CITY point-of-contact involved with the PROJECT and collaborate with them.
9. Charge staff time and expenses to the PROJECT. Issue Authority to Proceed (ATP) to the CITY to authorize the amount for CITY staff time and expenses for the PROJECT.
10. When design is approximately 35% complete, submit plan set to CITY for review.
11. When design is 75% complete, submit to CITY for review and comment on the plans specifications and estimate (PS&E).
12. At appropriate times make submissions to the CITY for Context Sensitive Solutions reviews as outlined in the CITY and DOT&PF's agreement.
13. When design is 95% complete, submit to CITY for review, and comment on the PS&E that will go to advertisement for bid solicitation. All comments will be adjudicated with the CITY's point of contact as identified in subsection C.1.

14. Submit the final PS&E package to the CITY for review and comment. All comments will be adjudicated with the CITY's point of contact as identified in subsection C.1, prior to advertising the PROJECT for bids.
15. DOT&PF will coordinate with CITY and provide the construction engineering and indirect cost allocation plan (ICAP) to the CITY with a copy of the contractor's Notice to Proceed.
16. Deduct the appropriate rate of ICAP to the PROJECT to cover DOT&PF indirect expenses. The current ICAP rate for FHWA projects is 7.64% of the total PROJECT costs consisting of DOT&PF staff labor and expenses, professional services contract, utility relocation, permit and review fees, CITY staff labor and expenses, ROW acquisition, and construction.
17. Submit each proposed change order to the CITY for review and comment prior to commencement of the work covered by the change order, and note if approval may result in the CITY exceeding the local match transferred for the particular phase.
18. The DOT&PF shall add a special provision to its bid documents extending the protections of Standard Specification 107-1.13 to the CITY. The DOT&PF shall add a special provision to its bid documents requiring the CITY to be listed as an additional insured on the policies required by Standard Specification 103-1.06, paragraphs 2 through 4. The CITY shall have the right to enforce these requirements against the successful bidder.
19. Notify the CITY at which time the project construction is substantially complete, and allow CITY the opportunity to provide punchlist of comments to be addressed prior to project acceptance/completion.

C. <u>CITY's Responsibilities</u>

CITY shall:

1. Establish a single point-of-contact with sufficient authority and responsibility to communicate to DOT&PF all decisions or notifications required by this agreement. The CITY shall be solely responsible for payment of contract price adjustments to

compensate for any owner-caused contract delay claims that are directly attributable to the CITY's failure to timely communicate decisions or notices required by this agreement.

2. Prior to initiation of each phase of the PROJECT, and as a condition precedent to the obligation of federal-aid highway funding, the CITY must provide to DOT&PF funds equivalent to its local cost share ("Local Share") obligation, as well as any additional amount that may be required for work not eligible for federal funding. The CITY's Local Share obligation for the completed project includes 9.03% of PROJECT costs for local match. The amount of CITY's Local Share obligation for the PROJECT, including 15% contingency amount for the initial preliminary engineering phase ("the adjusted total cost"), is estimated to be $135,450 (9.03% of $1,500,000) in Federal Fiscal Year (FFY) 2019 as shown in the current AMATS TIP. The TIP currently shows $2,500,000 for right of way in FFY 2022 and $50,000,000 for Construction in FFY2024. Both the DOT&PF and CITY recognized that these are planning-level estimates. The design-level estimated amounts for design, right of way, utilities and construction will be developed during preliminary design phase and the CITY's match amount shall be incorporated into the CITY's CIP and is subject to approval by the Municipal Assembly. The 9.03% of the total project cost (local match) contributed by CITY for the PROJECT shall be used only for federally participating work.
3. Provide additional funding to cover any work in the original scope of work, or under any change order recommended for approval by the CITY, that is determined to be ineligible for federal funding or exceeding actual or anticipated available federal funding for the PROJECT. The CITY shall cover the 9.03% local federal match commitment, plus all costs ineligible for federal participation. Since the CITY's ability to provide the additional funding depends on securing AMATS, Anchorage Road and Drainage Service Area bonds, or other means, DOT&PF and the CITY acknowledge that project phasing may be necessary to fund the PROJECT and that the schedule may be impacted accordingly.

4. Timely recommend approval or rejection of any change order that may exceed the 15% contingency amount for a phase; in no instance shall the CITY's recommendation be more than 10 calendar days after DOT&PF's delivery of the proposed change order and all supporting documents to the CITY's authorized representative. If the CITY intends to recommend rejection of any proposed change order that DOT&PF finds necessary for the completion of the PROJECT, within 7 days of the DOT&PFs delivery of the proposed change order the CITY shall provide an alternative change order proposal—which may include reduction of the PROJECT scope of work—that would allow timely completion of PROJECT. At the time of the CITY's recommended approval or recommended alternative proposal, the CITY must confirm availability of local match funding to cover any change order costs that may exceed the 15% contingency amount for the phase and transfer local match funding timely to process contract change order.
5. Provide funding at the 9.03% match rate to cover the costs of all PROJECT related litigation, including legal fees and costs, including challenges to Federal permits or decisions, condemnation or right-of-way matters, procurement claims, and construction claims. CITY shall assist the DOT&PF, as necessary, during the course of the PROJECT related administrative or civil proceedings and shall have the right to actively participate in the control of the litigation, including participating in strategy and settlement discussions, if it elects to do so. Except for condemnation claims, DOT&PF agrees not to initiate any PROJECT related claims for which any CITY funds would be required without the consent of CITY.
6. Review information and action items from DOT&PF and provide any necessary responses within fourteen calendar days of receipt.
7. Provide project management staff for coordination and review as needed, chargeable to the PROJECT.
8. Authorize the DOT&PF and its contractors on the PROJECT to conduct the necessary work within the CITY road rights-of-way, and provide the DOT&PF with construction easements and such other interests as required to meet federal right-of-way certification requirements.

9. Inspect the PROJECT right-of-way and property prior to project closeout. The CITY may perform an environmental assessment of that property for the purpose of determining whether any hazardous material contaminates the property. For purposes of this agreement, a "hazardous material" is any chemical, metal, petroleum product, or other substance (or any combination of hazardous materials) that is designated as "hazardous" by the U.S. Environmental Protection Agency and that is regulated by any government agency in any quantity as a contaminant, hazardous material, or threat to health or safety.
10. Participate in determining "substantial completion" of each phase or stage of the Project, and accept full ownership and complete responsibility for each phase or stage of the Project, and all improvements thereon, upon final completion of each. The CITY will continue to own and maintain the facility upon completion of the improvements. The CITY acceptance of ownership is not a direct or implied waiver of a contractor's responsibility to satisfactorily complete the work.

IV. PROJECT ADMINISTRATION

A. Except as otherwise expressly stated in this MOA, the DOT&PF shall be solely responsible for all project procurement.

B. Except as otherwise expressly stated in this MOA, the DOT&PF will be solely responsible for the administration of all project contracts, in accordance with its contract(s) with the contractor(s) ("construction contract(s)"). Except as provided in subsection C of this section IV, the CITY has no direct or implied right to enforce any terms or conditions of any professional services or construction contract(s) against either the DOT&PF or the contractor(s) except where there is alleged project mismanagement premised upon the DOT&PF's gross negligence, recklessness, or intentional misconduct.

C. The DOT&PF shall include warranty provisions in the construction contract(s) as needed. The CITY may directly enforce any warranty against the contractor.

D. Nothing herein shall be read to modify the scope of AS 09.50.250 or to waive any provisions thereof.

V. FINAL INSPECTION

Representatives of the CITY and the DOT&PF shall jointly conduct final inspections of each phase or stage of the PROJECT's construction and jointly determine when each such phase or stage of the PROJECT reaches the point of substantial completion. The term "substantial completion" as used in this MOA means that the construction is sufficiently completed to allow the CITY or a person authorized by the CITY:

A. to occupy the phase or stage constructed and improvements thereon; or

B. to use the phase or stage constructed and improvements thereon in the manner for which they were intended; or

C. to assume responsibility for the PROJECT if construction contract(s) are cancelled by the CITY.

The DOT&PF shall provide the CITY with Record Drawings of the PROJECT and all improvements at PROJECT closeout.

VI. THE CITY'S RIGHT-OF-WAY, OPERATIONS, AND MAINTENANCE OBLIGATIONS

The CITY's right-of-way management, operations, and maintenance duties for any stage or phase of the PROJECT shall commence on the date of final completion of that stage or phase. The CITY agrees that its obligations with regard to the PROJECT's right-of-way management, operations, and maintenance include the following:

A. The CITY agrees to perform, at its own expense, those right-of-way management, operations, and maintenance obligations required by the use of FHWA funds. In carrying out these obligations, the CITY's duties include:

1. Those identified in 23 C.F.R. §1.23 ("Rights-of-Way") and 23 C.F.R. §1.27 ("Maintenance"), which would otherwise be required of the DOT&PF if the DOT&PF owned the facility and improvements constructed under this MOA;
2. Management of the right-of-way and any utilities in accordance with relevant sections of 23 CFR Part 710 ("Right-of-Way and Real Estate") and 23 C.F.R. Part 645 ("Utilities");

3. Complying with the DOT&PF's Right-of-Way Manual;

4. Conducting oversight and management of utilities located in any PROJECT right-of-way consistent with the DOT&PF's Utility Manual, and complying with the utility policies and requirements set forth in AS 19.25.010-020 and 17 AAC 15;

5. Allowing no encroachments within the right-of-way of the PROJECT without the prior consent of the DOT&PF and the FHWA

6. Refrain from selling or conveying any portion of the right-of-way without prior consent from the DOT&PF. In the event that the DOT&PF gives its consent to the disposal of any portion of right-of-way acquired with federal-aid highway funds for the PROJECT, the CITY shall pay proceeds of the sale to the DOT&PF, which the DOT&PF will credit to the appropriate federal-aid and State accounts, based on the percentage of State match;

7. Issuing permits as required by the foregoing duties, and assuming sole responsibility for enforcement of all terms and conditions of such permits.

B. The CITY agrees to maintain and operate the PROJECT consistent with FHWA requirements imposed under 23 USC § 116 (Maintenance) and the CITY maintenance standards.

C. The CITY shall perform all operation and maintenance activities required by this MOA at its own expense and without reimbursement from the DOT&PF. Maintenance activities include, but are not limited to:

1. Planning, scheduling, administration, and logistics of maintenance activities;

2. Traffic control and safety;

3. Embankment protection, including erosion control, to as-built conditions;

4. Roadside management;

5. Guardrails and guardrail end treatments;

6. Snow and ice control, including all plowing, sanding, culvert and storm sewer thawing, snow hauling, winging, opening of shoulders, ice scraping, drift control, snow slide removal, and associated tasks as may be required for the safe and timely passage of the public;

7. Maintaining signs and delineators in an as-built condition and their replacement, including posts and foundations, when damaged, unreadable, or worn out;

8. Highway marking and repainting as required to maintain performance of their intended function;

9. Removal of debris, rubbish, and dead animals;

10. Signing of seasonal weight restrictions as may be required by local conditions;

11. Pothole repair using the appropriate asphalt or concrete products on an as-needed basis;

12. Annual crack sealing;

VII. TERM

This MOA shall become effective on the date of the last signature and shall apply through the design life of the PROJECT.

VIII. INCORPORATION CLAUSE

Upon PROJECT completion, the CITY shall comply with all Federal and State laws, regulations, executive orders, stewardship agreements, and DOT&PF agreements applicable to the design, construction, maintenance, and operation of this PROJECT. This obligation is in addition to compliance with any law, regulation, or executive order specifically referenced in this MOA.

IX. INDEMNIFICATION

To the maximum extent allowed by law, the CITY shall indemnify, defend, and hold the DOT&PF, its officers, employees, and agents (collectively the "Indemnified Parties") harmless from all liability, claims, causes of action, and costs (including attorney's fees) arising out of this Agreement or relating to the obligations assigned or work performed under this Agreement, including, but not limited to, liability, claims, and causes of action alleging or arising out of a negligent act or omission by one of the Indemnified Parties.

Notwithstanding the forgoing, the CITY shall have no obligation to indemnify, defend, or hold the Indemnified Parties harmless from:

1. claims for personal injury, death, or property damage arising from incidents occurring prior to Substantial Completion;
2. claims for personal injury, death, or property damage alleging a negligent act or omission by one of the Indemnified Parties and arising from incidents occurring within three years from the date of Substantial Completion; or
3. claims arising from or asserted under AS 46.03.822.

As used in this Section, "Substantial Completion" means the time at which the Project (a) can be safely and effectively used by the public without further delays, disruption, or other impediments, and (b) pavement structure, shoulder, drainage, sidewalk, permanent signing and marking, guardrail and other traffic barrier, safety appurtenances, utilities, lighting, and bridge deck and parapet work is complete.

X. EACH PARTY IS AN INDEPENDENT CONTRACTOR

For the purposes of this Agreement and all services to be provided hereunder, each party shall be, and shall be deemed to be, an independent contractor and not a partner, agent, or employee of the other party. Neither party shall have authority to make any statements, representations, or commitments of any kind, or take any action, which shall be binding on the other party, except as may be explicitly provided for herein or authorized by the other party in writing.

XI. CANCELLATION REMEDIES

A. If the CITY is the primary cause of cancellation of any professional services, consultant or construction contracts entered into by the DOT&PF, the CITY shall be responsible for those costs not accepted for reimbursement by the FHWA, amounts the FHWA expects to be reimbursed for, and any other costs or expenses incurred by the CITY or the DOT&PF in the PROJECT to the date of cancellation or related to finalizing cancellation and PROJECT termination.

B. If the DOT&PF is the primary cause of the cancellation, the DOT&PF shall bear those costs not accepted for reimbursement by the FHWA, amounts the FHWA expects to be reimbursed for, and any other costs or expenses incurred by the CITY or the DOT&PF in the PROJECT to the date of cancellation or related to finalizing cancellation and PROJECT termination.

C. If it is determined that the cancellation was caused by third parties or circumstances beyond the control of the DOT&PF or the CITY, the parties shall meet in good faith to negotiate a fair and equitable allocation of responsibility for those costs not accepted for reimbursement by the FHWA, amounts the FHWA expects to be reimbursed for, and any other costs or expenses incurred by the CITY or the DOT&PF in the PROJECT to the date of cancellation or related to finalizing cancellation and PROJECT termination.

D. The foregoing remedies are in addition to any other remedies referenced in this MOA, and do not bar or limit the parties from resorting to any other remedy available at law or equity.

XII. PENALTY FOR BREACH OF AGREEMENT OBLIGATIONS

A. Notification and Opportunity to Cure

If notified by the DOT&PF in writing that it is in violation of any of the terms, conditions, or provisions of this Agreement, including maintenance obligations, the CITY shall have ninety (90) days from the date of such notification to remedy the violation; or, if the remedy will take in excess of ninety (90) days to complete, the CITY shall promptly take responsive action necessary to achieve a satisfactory remedy as close as possible to the 90th day from DOT&PF's initial notice.

The CITY's failure to cure a violation that is remediable within ninety days or its failure to take responsive action necessary to promptly resolve a violation that is not remediable within ninety days constitutes a substantial breach of this MOA. If the CITY is in breach, DOT&PF may elect to terminate the MOA. In addition, the CITY's breach may adversely affect the viability of current and future municipal capital projects. *See* 17 AAC 05.175(*l*).

B. Remedies

In the event of breach of the CITY's obligations to own, maintain and operate the PROJECT or its improvements, damages shall include, but are not limited to:

1. Provided the breach could result under Federal Law in the Federal Highway Administration demanding return of Federal funds expended on the Project, return of the Federal and State funds expended on the PROJECT under this MOA;
2. Reimbursement to the DOT&PF for any costs incurred by the DOT&PF which are directly or indirectly related to fulfilling any of the CITY's contractual commitments; and

3. Withholding of approval of future federal-aid projects until such time as the CITY puts the PROJECT in a state of compliance with this MOA.

XIII. MISCELLANEOUS PROVISIONS

A. Amendment or modification of Agreement:

This MOA may only be modified or amended by written agreement signed by authorized representatives for both Parties.

B. The Whole Agreement:

This MOA constitutes the entire agreement between the Parties. There are no other understandings or agreements between the Parties, either oral or memorialized in writing regarding the matters addressed in this MOA. This MOA may not be amended by the Parties unless an amendment is agreed to in writing, with the both Parties signing through their authorized representatives.

C. Assignment:

Without the written consent of the DOT&PF, this MOA is not assignable by the CITY either in whole or in part.

D. Third Parties and Responsibilities for Claims:

Nothing in this MOA shall be construed as conferring any legal rights, privileges, or immunities, or imposing any legal duties or obligations, on any person or persons other than the Parties named in this MOA, whether such rights, privileges, immunities, duties or obligations be regarded as contractual, equitable, or beneficial in nature as to such other person or persons. Nothing in this MOA shall be construed as creating any legal relations between the DOT&PF and any person performing services or supplying any equipment, materials, goods, or supplies for the Project.

E. Duty of Cooperation:

The DOT&PF and CITY agree to provide reasonable access to the PROJECT and to relevant PROJECT records, to any authorized representatives of the Parties or U.S. Government. The Parties further agree to cooperate in good faith with inquiries and requests for information

relating to the PROJECT or its obligations under this MOA.

F. Necessary Approvals:

In the event that any election, referendum, ordinance, approval, permit, notice, or other proceeding or authorization is requisite under applicable law to enable the CITY to enter into this MOA or to undertake the PROJECT, or to observe, assume or carry out any of the provisions of the MOA, the CITY will initiate and consummate, as provided by law, all actions necessary with respect to any such matters so requisite.

G. Joint Drafting:

This MOA has been jointly drafted by the Parties, and each party has had the ability and opportunity to consult with its legal counsel prior to signature. The MOA shall not be construed for or against either party.

H. Third Party Beneficiary Status:

The CITY is not an intended beneficiary of any contracts between the DOT&PF and any contractors, subcontractors or consultants or any other third parties, and has no contractual rights with respect to such contracts or any provisions thereof, unless expressly stated otherwise.

XIV. CONTACTS

The DOTPF's contact is Sean Baski PE, Project Manager, Highway Design (Sean.baski@alaska.gov, 907-269-0547), or as may be re-designated in writing from time to time. The CITY's contact is Melinda Tsu, PE, Project Engineer, Project Management & Engineering (Melinda.Tsu@anchorageak.gov 907-343-8110), or as may be re-designated in writing from time to time.

The undersigned agree to the terms of this Memorandum of Agreement:

STATE OF ALASKA,
DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES

Dated: 2/21/2020 By: _____
Wolfgang Junge, PE
Regional Director, Central Region

SUBSCRIBED AND SWORN TO OR AFFIRMED before me by Wolfgang Junge, who is Regional Director for the Central Region of the Alaska Department of Transportation & Public Facilities, an agency established under Alaska law, on this 21 day of February, 2020.

ROX ANN DOWD NOTARY PUBLIC STATE OF ALASKA

Rox Ann Dowd
Notary Public, State of Alaska
My commission expires: End of Term

MUNICIPALITY OF ANCHORAGE

Dated: 2/14/20 By: _____
William D. Falsey
Municipal Manager, Municipality of Anchorage

SUBSCRIBED AND SWORN TO OR AFFIRMED before me by William D. Falsey, who is Municipal Manager of the Municipality of Anchorage, a Municipality established under Alaska law, on this 14th day of February, 2020.

JOY P. MAGLAQUI My Commission Expires NOTARY PUBLIC Jun 16, 2022 STATE OF ALASKA

Joy P. Maglaqui
Notary Public, State of Alaska
My commission expires: 6/18/22