

**AGREEMENT BETWEEN DES MOINES AREA MPO, POLK COUNTY, IOWA AND
CENTRAL IOWA WATER TRAILS, LLC**

This AGREEMENT (hereinafter “Agreement”) is made as of the ____ of _____, 2021, by and between Central Iowa Water Trails, LLC, an Iowa limited liability company (hereinafter “CIWT”), Polk County, Iowa (hereinafter “Polk County”), and the Des Moines Area Metropolitan Planning Organization, a unit of local government pursuant to Iowa Code Chapter 28E (hereinafter “MPO”).

WHEREAS, CIWT, Polk County, and the MPO desire to develop, construct, and operate a world class system of water trails and dams with the goals of improving the quality of life for Iowans, attracting visitors and revitalizing local river fronts, all located in central Iowa (hereinafter the “Project”); and

WHEREAS, the MPO was awarded a Better Utilizing Investments to Leverage Development Transportation Discretionary Grants Program (hereinafter “BUILD Grant”) grant in an amount not to exceed \$25,000,000; and

WHEREAS, the BUILD Grant funds were granted for use in further development of the Project; and

WHEREAS, the current construction cost of the Project is estimated to be \$31,987,000 and CIWT has agreed to secure all necessary funds to complete the project in excess of the \$25,000,000 BUILD grant funds and the \$550,000 Surface Transportation Block Grant (STBG) funds; and

WHEREAS, the MPO will serve as the contracting authority and remain in responsible charge for the construction contract; and

WHEREAS, Polk County will oversee construction administration and observation of the construction contract provisions on behalf of the MPO; and

WHEREAS, the City of Des Moines will oversee the operation and maintenance of the constructed facilities for the required 20-year time period following the construction of the project; and,

WHEREAS, CIWT will deposit the required matching funds plus funds to cover construction management costs into an account held by both the MPO to be expended exclusively in accordance with and in fulfillment of this Agreement; and

WHEREAS, it is the desire of the MPO to plan, develop, construct, and operate the Project, in conjunction with Polk County, the City of Des Moines, and CIWT, and to receive, expend, and pay the BUILD Grant funds through the MPO in accordance with the BUILD Grant Agreement

currently under negotiation between the MPO, the Federal Highway Administration (“FHWA”), and the Iowa Department of Transportation (IDOT), and also in accordance with the sub-agreement between the MPO and the IDOT; and

WHEREAS, the City of Des Moines, the Iowa Department of Transportation (hereinafter “IDOT”), and the FHWA are expressly within the contemplation of the parties to this Agreement and mutually intended to be third-party beneficiaries of this Agreement; and

NOW THEREFORE, in consideration of the forgoing and mutual covenants contained herein, the receipt and sufficiency of which are hereby mutually acknowledged, the parties agree as follows:

1. Agreement. Agreement means this Agreement, Exhibits A--G to the Agreement, the Project budget.
2. Services. The MPO, CIWT, and Polk County agree to furnish on the sites identified in Exhibit A (“Sites”) all the services described in Exhibits B (“Services”). The MPO, CIWT and Polk County agree to furnish the Services in a timely and expeditious manner consistent with the applicable professional standard of care, and in any event exercising its commercially reasonable efforts, skill, and expertise in the provision of the Services. Exhibit B is delineation of services to be provided by the MPO, CIWT, City of Des Moines, and Polk County that will be necessary for the Project to be timely completed. Any changes to the scope or timing of the Services must be approved by the MPO with consultation from the FHWA and the IDOT. The deadline for construction completion will be December 30, 2024, unless that deadline is extended with the written concurrence of the MPO and FHWA.
3. Disbursements. The MPO shall make timely application for reimbursements of the BUILD Grant funds and disburse the same according to the payment process set forth in Exhibit C. Expenditures made prior to the effective date of this Agreement will not be eligible as Project costs. The parties agree that any expenditure submitted to the MPO for reimbursement will be subsequently submitted by the MPO to the IDOT. All funds that the IDOT approves for reimbursement will be distributed to the bank account held by the MPO for expenses related to completion of the Project.
4. Documents, Data, Records and Information. Polk County will make available to the MPO all documents, data, records, and information pertinent to construction and operation of the Project, and acknowledges that the MPO, as a governmental body, is subject to Iowa Open Meetings and Public Records laws and regulations. Polk County will provide the MPO, its consultants and representatives, as well as third-party beneficiaries, access during normal business hours to any records, contracts, projections, schedules, or other information relating to the Project, and keep the MPO apprised as to the day-to-day construction operations of the Project. The MPO must retain all documents, data, records, and information pertinent to construction and operation of the Project for a period of three (3) years after the Project is completed. Polk County will maintain and make available to

the MPO all construction administration documentation generated during the Project. Upon completion of the Project, Polk County will transmit to the MPO a full and final set of construction documents.

5. Notices. All notices or other communications made pursuant hereto shall be in writing and shall be deemed properly delivered, given or served (i) when personally delivered, or (ii) five (5) calendar days after being deposited in the United States mail, certified or registered, postage prepaid, return receipt requested, or (iii) when delivered by FedEx or other comparable courier service, charges prepaid, to the parties at their respective addresses listed below their signatures. Either party and any third-party beneficiary may change its address for the purposes of this paragraph by giving five (5) days prior written notice of such change to the others.

MPO:

c/o Executive Director
420 Watson Powell Jr Way Des Moines, IA 50309

CIWT:

POLK COUNTY:

Third-party Beneficiaries:

City Manager
City of Des Moines
400 Robert D. Ray Drive
Des Moines, Iowa 50309-1891

IDOT:

Debra Arp
Systems Planning Bureau
800 Lincoln Way
Ames, Iowa 50010

FHWA:

Paul LaFleur
FHWA – Iowa Division
105 6th Street
Ames, IA 50010

6. Coordination; Right to Information. MPO acknowledges that the development and processing of the Services for the Project may require close coordination between various consultants. MPO shall use its best efforts to coordinate the Services required hereunder

with the other consultants that are identified by the MPO to CIWT or Polk County from time to time.

7. Events of Default and Remedies.

- a. Any breach by CIWT of any term or condition of the contracts between the CIWT and the City of Des Moines, or covenants with the City of Des Moines, shall constitute a default under this Agreement. No election by the City of Des Moines to waive any deficiency or its failure to exercise any of its remedies against the CIWT will relieve CIWT from obligations under this Agreement.
- b. The term of this Agreement shall commence on the date hereof and shall terminate on the date of completion of the Services unless earlier terminated pursuant to this Section 8. Prior to making the first disbursement of the BUILD Grant funds, the MPO may terminate this Agreement at any time and for any reason with ten (10) calendar days' prior written notice to Polk County, City of Des Moines, and CIWT.
- c. CIWT may terminate this Agreement upon giving prior written notice to the MPO only if the MPO: (a) materially breaches this Agreement, and such breach is incapable of cure, or with respect to a material breach capable of cure, the MPO does not cure such breach within forty-five (45) days after receipt of written notice of such breach, or (b) (i) becomes insolvent or admits its inability to pay its debts generally as they become due; (ii) becomes subject, voluntarily or involuntarily, to any proceeding under any domestic or foreign bankruptcy or insolvency law, which is not fully stayed within twenty business days or is not dismissed or vacated within 60 days after filing; (iii) is dissolved or liquidated or takes any corporate action for such purpose; (iv) makes a general assignment for the benefit of creditors; or (v) has a receiver, trustee, custodian or similar agent appointed by order of any court of competent jurisdiction to take charge of or sell any material portion of its property or business. No such termination by CIWT will relieve CIWT from its indemnification obligations as provided in paragraph 10 hereof.
- d. In the event of any breach by CIWT, the MPO will be entitled to exercise all rights and remedies available at law or in equity and, in the event of litigation, the prevailing party will be entitled to recovery of costs and reasonable attorney fees.
- e. In the event of termination of this Agreement, CIWT shall sign and deliver to the MPO true and complete copies of CIWT's work product. As used herein, the "effective date of termination" shall be that date which is ten (10) calendar days after receipt of the notice of termination. The remedial and indemnification provisions for any breach shall survive the termination of this Agreement.

8. Venue and Jurisdiction. Any and all claims, disputes, or controversies related to this Agreement, or breach thereof; shall be litigated in the federal courts of the United States or the courts of the State of Iowa in each case located in the City of Des Moines, which shall be the sole and exclusive forum for such litigation.

9. Indemnification. CIWT shall defend, indemnify, and hold harmless the MPO and its members, managers, officers, employees, agents, successors, and permitted assigns from and against all losses, damages, liabilities, deficiencies, actions, judgments, interest, awards, penalties, fines, costs or expenses of whatever kind, including reasonable attorneys' fees and the cost of enforcing any right to indemnification hereunder, and the cost of pursuing any insurance providers, arising out of or resulting from: (a) bodily injury, death of any person or damage to real or tangible, personal property resulting from the willful, fraudulent or negligent acts or omissions of CIWT or its personnel; and (b) CIWT's breach of any of its representations, warranties or obligations set forth in this Agreement, INCLUDING by way of example and not as a limitation, the MPO's obligations to the FHWA with respect to BUILD Grant funds EXCEPT those losses incurred by the MPO resulting from willful misconduct or negligence on its or their part. The interpretation of this Agreement shall be governed by the terms of the BUILD Grant agreement and the MPO-IDOT sub-agreement and conflicts between those terms and the terms of this Agreement shall be resolved in favor of the terms of the BUILD Grant.
10. Insurance.
- a. CIWT will obtain and maintain throughout the term of this Agreement public liability insurance in such company or companies, and in such coverage amounts as may be agreeable to the MPO and such policy(ies) shall name the MPO as an additional insured with the right to notice prior to any coverage change or cancellation. Upon request of any MPO successor or assign, such successor or assign will likewise be added as an additional named insured with the right to notice prior to any coverage change or cancellation.
 - b. If, for any period of time, CIWT is in breach of the foregoing insurance requirements, the MPO is authorized, but not required, to effectuate such insurance immediately and without prior notice to CIWT and the cost thereof will be recoverable from CIWT.
11. General Conditions.
- a. The MPO, CIWT,, and Polk County shall perform the Services in a skillful, professional and competent manner and in accordance with the standard of care, skill, and diligence applicable in the industry with respect to similar services, in this area at this time. The parties hereto anticipate that decisions shall be made in a consensual manner; provided, however, that in the event of any disagreement between the parties, the parties the MPO will make the final decision as the responsible charge.
 - b. Each of the Exhibits referred to herein and attached hereto is an integral part of this Agreement and is incorporated herein by reference.
 - c. This Agreement shall be construed and interpreted under and shall be governed and enforced according to the domestic laws of the State of Iowa (without reference to the doctrine of conflicts of law).

- d. This Agreement constitutes an agreement for the performance of services by the MPO, CIWT, and Polk County. Nothing contained in this Agreement shall be deemed to create a relationship of employer-employee, master-servant, partnership, joint venture or any other relationship between the MPO, CIWT, and Polk County. Neither CIWT, nor Polk County shall have authority to bind the MPO unless specifically approved by the MPO in writing. Work will be performed by employees of the CIWT unless otherwise agreed by the MPO. CIWT will be responsible for worker compensation insurance, unemployment taxes, and other expenses associated with the Project including without limitation the cost of necessary permits and licenses.
- e. This Agreement including Exhibits D-G contains the entire agreement between the parties with respect to the subject matter hereof and supersedes all other agreements or understandings between the parties with respect thereto.
- f. A separate agreement for the maintenance of the Project post-completion shall be entered into by and between MPO and the City of Des Moines. The MPO shall relieve themselves of the burden of the maintenance by flowing down this responsibility through the sub-agreement with the City of Des Moines. The MPO will produce a performance measurement report for a period of three (3) years post-completion.
- g. This Agreement may not be amended or supplemented, nor may any obligations hereunder be waived, except by a written instrument signed by the party to be charged after consultation with the FHWA and the IDOT.
- h. This Agreement and the covenants contained herein shall be binding upon and shall inure to the benefit of the parties hereto and their respective permitted assigns and successors-in-interest, as well as to each of the named third-party beneficiaries.
- i. No failure or delay by either party in the exercise of any right given to such party hereunder shall constitute a waiver thereof. No waiver of any breach of any agreement or provision contained herein shall be deemed a waiver of any preceding or succeeding breach thereof or of any other agreement or provision contained herein.
- j. Whenever the context hereof shall so require, the singular shall include the plural, the male gender shall include the female and the neuter, and vice versa.
- k. The invalidity, illegality or unenforceability of any provision of this Agreement shall not affect the validity or enforceability of any other provision hereof. In any such event, a court of competent jurisdiction is authorized to reform such provision(s) in a way that will most nearly achieve the original intent of the parties.
- l. This Agreement may be executed in any number of counterparts, each of which shall be deemed an original but all of which shall together constitute one instrument. Facsimile or pdf signatures shall be recognized as originals.

- m. Time is of the essence of this Agreement. All references to the MPO shall include its successors and assigns. If and only to the extent likewise recognized by the FHWA under the BUILD Grant, in no event shall CIWT be liable or responsible or be deemed to have breached this Agreement for any failure or delay in performing any term of this Agreement (except for any payment obligation) when and to the extent such failure or delay is caused by any circumstances beyond the Operator's reasonable control (a "**Force Majeure Event**"), including acts of God, flood, fire, earthquake, explosion, war, terrorism, invasion, riot or civil unrest, embargo, blockade, strikes or labor stoppages or other industrial disturbances, passage of law, pandemic, government shutdown, or nonpayment of funds by the FHWA.
- n. Each of the respective parties represents that such action has been taken as is necessary to be legally bound by the undertakings in this Agreement. Each of the respective parties affirmatively represents that fulfilling their obligations under this Agreement will not constitute a breach of any other contract or agreement to which that party is also a party.
- o. The respective parties agree to execute such other and additional documents and do such other and additional things as may be necessary and prudent to effectuate the foregoing.

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IN WITNESS WHEREOF, the parties have executed this Agreement effective as of _____, 2021.

CENTRAL IOWA WATER TRAILS, LLC

**DES MOINES AREA METROPOLITAN
PLANNING ORGANIZATION**

By:

By:

Name:

Name:

Title:

Title:

POLK COUNTY, IOWA

By:

Name:

Title:

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EXHIBIT B TO AGREEMENT

Pursuant to the Agreement between Central Iowa Water Trails, LLC, an Iowa limited liability company (hereinafter “CIWT”), Polk County, Iowa (hereinafter “Polk County”), and the Des Moines Area Metropolitan Planning Organization, a unit of local government pursuant to Iowa Code Chapter 28E (hereinafter “MPO”), below are the services to be provided by CIWT in furtherance of the Project:

1. CIWT shall be responsible for raising and securing all funds in excess of the \$25,000,000 BUILD grant and the \$550,000 STBG funds secured by the MPO necessary to complete the Project, as well as the funds needed to pay for construction management services, and shall deposit those funds in an account held by the MPO to be expended exclusively in accordance with and in fulfillment of this agreement.
2. MPO shall be responsible for directing and approving the design of the Project.
3. CIWT shall be responsible for all costs associated with the design of the Project.
4. MPO shall be responsible for obtaining all applicable federal, state, and local permits required for the construction and operation of the Project.
5. CIWT shall be responsible for all costs associated with obtaining federal, state and local permits.
6. MPO shall be responsible for complying with all provisions of the BUILD grant (**Exhibit D**) between the MPO, IDOT and the Federal Highway Administration.
8. MPO shall approve all pay items and change orders.
9. The City of Des Moines shall be responsible for maintaining the Project post completion for the required 20-year period. This is outlined in the agreement between the MPO and the City of Des Moines and provided as **Exhibit G**.
10. Polk County shall amend its current contract with Snyder and Associates to provide construction administration and observation services on the Project on behalf of the MPO. Polk County, under the direction of the MPO, will oversee that Snyder and Associates:
 - Keeps the MPO apprised of on-going construction activities on a daily basis;
 - provides bi-weekly construction updates to the MPO, CIWT, City of Des Moines, and the IDOT.
 - facilitates construction meetings
 - Prepares change orders after authorization of the MPO
 - reviews payrolls, conduct payroll interviews, and ensure the provisions of Davis-Bacon are met
 - collects documentation that ensures the provisions of Buy America are met

- performs material inspections
- prepares construction pay estimates and submits to the MPO for review and payment
- oversees construction close out
- tracks the project schedule
- reviews shop drawings
- performs on-site observation and inspections

11. Polk County will complete a final construction audit with the IDOT and provide all project records to the MPO to be retained for a minimum of three years following the FHWA closure of the Project.

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