

CITY USE ONLY

Agreement No. _____	P.O. No. _____	Attorney _____ Code Y14511.docx
CIP No. _____	Project _____	Finance _____ Eff. Date _____
Dept. No./MOU _____	Amount _____	City Engineer _____

SUBDIVISION CONSTRUCTION AGREEMENT

The requirements contained herein shall apply to Public Improvements for subdivisions or for connection to subdivisions built privately and to be dedicated to the City of Sioux Falls (“City”). The intent of these requirements is to set forth the security to be provided relative to the construction of Public Improvements. Any capitalized terms not defined herein, but defined in City Ordinance, shall have the meaning as defined in said Ordinance.

THIS AGREEMENT (“*Agreement*”) is made between the City of Sioux Falls, South Dakota (hereinafter referred to as “*City*”) and _____, its heirs, executors, administrators, successors, transferees, and assigns jointly and severally (hereinafter referred to as “*Responsible Party*”) and is effective upon signature of the Mayor of the City of Sioux Falls.

DECLARATIONS

WHEREAS, _____ is the Owner or Developer of certain lands subject to the jurisdiction of the City (hereinafter referred to as “*Owner*” or “*Developer*”); and

WHEREAS, the City wishes to prevent the use of public funds to complete private developments; and

WHEREAS, the City requires the execution of this Agreement as a prerequisite to approval of the Final Plat of the subdivision or the issuance of a Construction Permit authorizing the commencement of construction activities; and

(Check one)

WHEREAS, the Responsible Party wishes to proceed with construction of the required Public Improvements before platting and has submitted, and the City has approved construction plans for the subdivision identified as _____ Addition Phase _____, which are hereby attached to and made part of this Agreement. Also attached and hereby made part of this Agreement is a preliminary plat including LEGAL DESCRIPTION OF LOTS; or

WHEREAS, the Responsible Party wishes to proceed with platting of (Legal Description)

prior to installation of the required Public Improvements of which the associated plat(s) are hereby attached to and made part of this Agreement. The Responsible Party has submitted and the City has approved Development Engineering or Construction plans identified as _____ Addition Phase _____, which are hereby attached to and made part of this Agreement. The Responsible Party will have approved construction plans prior to issuance of the Construction Permit.

NOW, THEREFORE, in consideration of the above, the City and Responsible Party hereby agree as follows:

1. DEFINITIONS - THE DEFINITIONS SET FORTH HEREIN SHALL APPLY SOLELY TO THIS AGREEMENT.

- a. **CITY ENGINEER.** The City Engineer for the City of Sioux Falls or his or her authorized representative.
- b. **CITY ORDINANCE.** Code of Ordinances of Sioux Falls, South Dakota, as adopted and as amended from time to time.
- c. **CONSTRUCTION PERMIT.** The permit required prior to the installation of Public Improvements including, but not limited to, street grading, roadway base, curb and gutter, asphalt or concrete surfacing, drainage and flood control, water and sanitary sewer, sump pump collection, or other such improvements in proposed subdivisions or which connect proposed subdivisions.
- d. **DEVELOPER.** The owner of land proposed to be subdivided or its authorized agent who shall have express written authority to act on behalf of the owner. Consent shall be required from the legal owner of the premises.
- e. **FINAL ACCEPTANCE.** The written notice from the City Engineer verifying that all required Public Improvements are complete according to the approved plans, specifications, and standards.
- f. **FINAL PLAT.** The plat approved by the City pursuant to Section 157.068 of the Code of Ordinances, of Sioux Falls, South Dakota.
- g. **PERFORMANCE SECURITY.** The financial security as provided for herein to ensure that all Public Improvements are completed by the Responsible Party or as provided herein.
- h. **PUBLIC IMPROVEMENTS.** Are those improvements which will be accepted for operation and maintenance by the City of Sioux Falls and shall include, but not be limited to, street grading, roadway base, curb and gutter, asphalt or concrete surfacing, drainage and flood control, water and sanitary sewer, sump pump collection, roadway lighting, or other such improvements in proposed subdivisions.
- i. **RESPONSIBLE PARTY.** A responsible party means any person seeking to plat a subdivision, including but not limited to (a) owners holding the land for investment purposes, who are not engaged in construction and not holding themselves out as real estate developers, and (b) any developer who is holding or purchasing the land primarily for sale to customers in the ordinary course of business and who is seeking to subdivide property or obtaining a construction permit authorizing the commencement of construction activities for a subdivision. A responsible party must file and comply with subdivision plans and other requirements under this chapter (including entering into a Subdivision Construction Agreement and posting a suitable Performance Security and/or Warranty Security, as applicable), regardless of whether such requirements refer to an “*Owner*” or “*Developer*” or both.

- j. **WARRANTY PERIOD(S).** The One (1) or Two (2) year period(s) from the date of written notice granting Final Acceptance, utility acceptance, or delayed acceptance from the City Engineer as set forth in Section 6 hereof.
- k. **WARRANTY SECURITY.** The financial security as provided for herein to warrant all Public Improvements as more fully provided for herein by the Responsible Party or a security provider as set forth herein.

2. TIME PERIOD FOR CONSTRUCTION.

The Responsible Party shall complete construction of all Public Improvements in accordance with the approved plans, specifications and standards within Two (2) years of the date of this Agreement. At the Responsible Party's request, the City Engineer may extend the time period in which to complete the construction for one additional year if the City Engineer determines that such an extension is justified. The City Engineer may allow for an additional extension in cases of extreme hardship as set forth in Section 6 herein.

3. CONSTRUCTION PERMIT.

Prior to the start of work, the Responsible Party shall obtain a Construction Permit from the City Engineer's Office allowing the Responsible Party to begin construction within the specified subdivision. The Responsible Party shall ensure the Construction Permit is kept valid for the term and any extension of this Agreement. Should the Construction Permit terminate for any reason before continuing work, the Responsible Party will be required to revise the plans to meet the current standards and obtain a new Construction Permit.

4. PERFORMANCE SECURITY.

The Responsible Party understands and agrees that the City will not approve any Final Plat within the identified subdivision until all Public Improvements are completed and accepted in accordance with this Agreement, unless prior to any Final Plat, the Responsible Party executes a Performance Security in favor of the City in the amount of One Hundred percent (100%) of the Engineer's Estimate to construct the Public Improvements not yet installed and accepted by the Engineer. In no event shall the Performance Security be less than Ten percent (10%) of the Engineer's Estimate to construct all Public Improvements. This minimum of Ten percent (10%) shall be maintained until all Public Improvements are completed, accepted by the Engineer, and the Responsible Party has furnished to the City the required Warranty Security.

The Responsible Party shall use the Performance Security form and/or criteria approved by the City Attorney. The Performance Security shall be secured in favor of the City by any one of the following methods:

- a. Escrow account.
- b. A bond issued by a corporate surety licensed and authorized to do business in the State of South Dakota as surety and subject to written approval by the City Engineer, which approval shall be at its sole discretion.
- c. Irrevocable letter of credit.

Any streetlighting that will be or has been furnished and installed by the City and has not been paid for must also be included in the Engineer's Estimate and Performance Security prior to final platting.

The Responsible Party shall utilize the form provided by the City relative to the escrow account, irrevocable letter of credit, or bond methods of security. Said agreement(s) must be elected and signed at the inception of this Agreement.

5. PERFORMANCE SECURITY REDUCTIONS.

A Performance Security may be reduced prior to Final Acceptance of all required Public Improvements. To qualify for a Performance Security reduction, the Responsible Party must complete the Public Improvements in compliance with the approved plans, specifications, and standards as determined by the City Engineer.

Each reduction allowed will be in the amount of the estimated cost, prepared and certified by the Responsible Party's Engineer, of the part of the subdivision improvements accepted in writing by the City Engineer. In no event shall the Performance Security be reduced to less than Ten percent (10%) of the Engineer's Estimate for all subdivision improvements until all Public Improvements are completed, accepted by the City Engineer, and the Warranty Security is in place.

A request for reduction in the Performance Security may be made no more frequently than every Thirty (30) days. Upon receipt of a reduction request, the City Engineer will respond to the Responsible Party within Seven (7) working days and either approve or deny the request.

6. UTILITY AND FINAL ACCEPTANCE AND WARRANTY OF IMPROVEMENTS.

- a. Acceptance of the required Public Improvements will be completed in two stages: Utility Acceptance which includes the water main system, sanitary sewer system, storm sewer system, and sump pump collections systems; and Final Acceptance which shall consist of all other Public Improvements including, but not limited to, grading, crushed base, valley gutters, fillet sections, curb and gutter, and surfacing.

When all required Public Improvements are complete, as defined above, the Responsible Party shall submit a written request for a Utility Acceptance inspection or Final Acceptance inspection. Within Seven (7) working days of the request, the City Engineer will complete an inspection. If after that inspection the City Engineer finds that all required Public Improvements for the respective inspection, including punch list items, are complete according to the approved plans, specifications, and standards, the City Engineer shall provide written notice granting acceptance of those Public Improvements.

Warranty of the Public Improvements shall be as follows:

(1) Utility Acceptance and Warranty

The Responsible Party shall warrant all water main systems, sanitary sewer systems, storm sewer systems, and sump pump collections systems free from defects for a time period of Two (2) years from the date of written notice from the City Engineer granting Utility Acceptance.

(2) *Final Acceptance and Warranty*

The Responsible Party shall warrant all other Public Improvements free from defects for a time period of One (1) year from the date of written notice from the City Engineer granting Final Acceptance.

b. Exceptions for Extreme Hardship:

(1) *Extreme Hardship*

The Responsible Party may submit a written request to the City Engineer requesting an exception to the installation of the required Public Improvements within the specified time frame if installation of said improvements will create an extreme hardship for the Responsible Party. The City Engineer will have sole discretion in determining if an extreme hardship exists. If the City Engineer determines an extreme hardship exists, the City Engineer will determine the length of time the installation of the improvements will be allowed to be delayed up to a maximum of Five (5) years from the date of such determination. The City Engineer may require a Performance Security be provided for an amount of up to One Hundred percent (100%) of the cost of the improvements not completed plus projected inflationary costs for said Public Improvements.

(2) *Extension of Warranty Periods*

Warranty periods will begin upon the completion and Final Approval of the delayed installation of Public Improvements. The Warranty Security in the amount of Ten percent (10%) of the original Engineer's Estimate for all the work will be required to remain in place until all warranty periods, including delayed installation improvements, have been completed with the following exception: if the original Warranty Periods have expired and the cost of the delayed installation improvements are less than the warranty security, then the Warranty Security for the delayed installation warranty improvement security may be reduced to One Hundred percent (100%) of the cost of the delayed installation improvements.

7. WARRANTY SECURITY.

The Responsible Party understands and agrees that the City will not approve any Final Plat within the identified Subdivision until it has been determined all required Public Improvements have been accepted and found free of defects for the required Warranty Period(s), unless prior to any final platting the Responsible Party executes a Warranty Security in favor of the City for Ten percent (10%) of the Engineer's Estimate for the duration of the Warranty Period(s). The Responsible Party shall use the Warranty Security form approved by the City Attorney. Each Warranty Security required by this Agreement shall be secured in favor of the City by one of the following methods:

- a. Escrow account.
- b. A bond from a Corporate surety licensed and authorized to do business in the State of South Dakota as surety and subject to written approval by the City Engineer which approval shall be at its sole discretion.
- c. Irrevocable letter of credit.

The Responsible Party is not required to provide a warranty for the streetlighting furnished and installed by the City. However, the cost of furnishing and installing such street lighting will be used for purposes of calculating the Ten percent (10%) Warranty Security as set forth herein.

8. WARRANTY INSPECTIONS.

A minimum of Forty-Five (45) days prior to the end of the Warranty Period, the City Engineer will conduct a warranty inspection. A written list of warranty repairs will be prepared and presented to the Responsible Party. The Responsible Party will be responsible for notifying the City Engineer in writing when the warranty repairs have been completed and the City Engineer shall inspect the same within Ten (10) business days of such notice. The Warranty Security will remain until all warranty repairs have been completed and accepted by the City Engineer. The City Engineer will verify the warranty repairs have been completed and provide written correspondence acknowledging acceptance of the warranty repairs and release of the Warranty Security.

9. ENGINEER'S ESTIMATE.

The engineer retained by the Responsible Party ("*Responsible Party's Engineer*") shall prepare and provide an itemized estimate ("*Engineer's Estimate*") to construct the Public Improvements. The Responsible Party's Engineer shall be a professional engineer, P.E., licensed to work in the state of South Dakota. Each line item used to create the estimate shall either be a City standard bid item or a similar line item that clearly defines the scope of work. Each line item shall include a description, quantity, unit price, and total price. The total sum of all line items shall be included at the bottom of the Engineer's Estimate. Proof of actual costs may be utilized to develop the Engineer's Estimate. The Engineer's Estimate will be subject to the approval of the City Engineer. In the event there will be oversizing or material reimbursement payments made by the City to the Responsible Party, said payment may be shown as a credit in arriving at the Engineer's Estimate.

10. STREETLIGHTING.

The Engineer's Estimate shall include, in addition to the cost of all Public Improvements, the cost for streetlighting to be furnished and installed by the City. The City will provide the streetlighting design and cost estimate to the Responsible Party's Engineer upon request. Requirements shall meet the Engineering Design Standards for Street Lights. The Responsible Party shall incur all costs associated with the installation of the street lights including, but not limited to, material, labor, and wire charges from the respective energy company.

11. AUTHORITY OF THE CITY ENGINEER.

As the representative of the City, the City Engineer is in charge of engineering details and administration of the Public Improvements. Work shall be performed to the satisfaction of the City Engineer. The City Engineer will decide questions which may arise as to the quality and acceptability of materials furnished, work performed, all questions which may arise as to the interpretation of documents, and all questions as to the acceptable fulfillment of this Agreement on the part of the Responsible Party. The City Engineer has the authority to reject defective material and work.

The City Engineer will have the authority to, by written suspension order, suspend the work wholly or in part, for failure to carry out conditions of this Agreement, for failure to carry out orders, for conditions considered unsuitable for the prosecution of the work, or for other conditions or reasons determined by the City to be in the public interest.

The City Engineer's decision, while final, shall be subject to appeal pursuant to Sections 30.040 through 30.046 of the Code of Ordinances of Sioux Falls, South Dakota.

12. COORDINATION OF DOCUMENTS.

The City's current edition of the Supplemental Standard Specifications are hereby made a part of this Agreement in their entirety unless otherwise revised, deleted, or supplemented herein.

Division II—Construction Details and Division III—Materials Details of the current edition of the South Dakota Department of Transportation *Standard Specifications for Roads and Bridges* and the current version of the South Dakota Department of Transportation *Supplemental Specifications and Errata* related to Division II and Division III are hereby made a part of this Agreement in their entirety unless otherwise revised, deleted, or supplemented herein.

The coordination of these documents is an essential part of the Agreement. A requirement occurring in one is as binding as though occurring in all. They are intended to be complimentary and to describe and provide for a complete work. For discrepancies, the items shall prevail or govern in the following descending order:

- a. Subdivision Construction Agreement.
- b. Plans.
- c. Standard Specifications (a.k.a. Supplemental Standard Specifications).
- d. South Dakota Department of Transportation *Supplemental Specifications and Errata* related to Division II and Division III of said document.
- e. Division II (Construction Details) and Division III (Materials Details) of the South Dakota Department of Transportation *Standard Specifications for Roads and Bridges*.

Nothing contained herein shall relieve the Responsible Party of complying with other requirements imposed by Sioux Falls City Ordinance or as otherwise legally or contractually required.

13. COOPERATION BY RESPONSIBLE PARTY.

The Responsible Party shall give the work the constant attention necessary to facilitate progress towards completion and shall cooperate with the City Engineer and City Inspectors ("*Inspector(s)*"). The Responsible Party shall not take advantage of apparent errors or omissions in the plans and specifications. If the Responsible Party discovers an error or omission, in the plans or specifications, the Responsible Party will immediately notify the City Engineer in writing or via email. The City Engineer will make corrections and interpretations as necessary to fulfill the intent of the plans and specifications.

14. DUTIES OF THE INSPECTOR.

Inspectors employed by the City are authorized to inspect work and materials furnished by the Responsible Party. Inspection may extend to any part of the work, preparation, fabrication, or manufacture of the materials to be used. The Inspector is not authorized to alter or waive the conditions of this Agreement. The Inspector is not authorized to issue instructions contrary to the plans and specifications or to act in a supervisory capacity for the Responsible Party. The Inspector will have the authority to reject work or materials until any questions at issue can be referred to and decided by the City Engineer.

Neither the City's authority to inspect all work nor any actual inspections performed by the City during the course of construction shall constitute an acceptance of work performed or operate to relieve the Responsible Party and/or Contractor's obligation to construct the project in compliance with the plans and specifications.

15. INSPECTION OF WORK.

Materials and details of the work shall be subject to inspection by the City Engineer. The City Engineer shall be allowed to enter upon Responsible Party's property and have access to the work site to inspect during regular business hours and shall be furnished with such information and assistance by the Responsible Party as is required to make a complete and detailed inspection.

16. MATERIALS.

All materials and equipment furnished under this Agreement shall be new unless approved in writing by the City Engineer. Materials used shall conform to requirements of the approved plans, specifications, and standards. The City retains the right to perform any and all record testing which may be deemed necessary or advisable by the City Engineer. To expedite the inspection and testing of materials, the Responsible Party may notify the City Engineer of proposed sources of materials prior to delivery. Work in which unapproved materials are used shall be performed at the Responsible Party's risk and are subject to inspection, testing, or rejection. Copies of tests will be furnished to the Responsible Party's representative when requested.

Samples taken and tests made will be in accordance with the most recent standard or tentative standard methods of City of Sioux Falls Minimum Testing Requirements Policy, AASHTO, ASTM, and the "*South Dakota Department of Transportation, Materials Manual-Sampling and Testing Procedures.*" Samples will be taken and tests made by a representative of the City and at the City's expense except as otherwise stipulated.

If a discrepancy exists, the order of precedence is as follows:

- a. City of Sioux Falls Minimum Testing Requirements Policy.
- b. Department's Materials Manual.
- c. AASHTO.
- d. ASTM.

17. CONFORMITY WITH PLANS AND/OR SPECIFICATIONS.

Work performed and materials furnished shall conform to the lines, grades, cross sections, dimensions, and material requirements, including tolerances, shown on the plans, specifications, or other documents.

If the City Engineer finds the materials furnished, work performed, or the finished product is not in full conformity with the plans and specifications, resulting in an inferior or unsatisfactory product, the Responsible Party will remove and replace or correct the work or materials at its own expense.

If the City Engineer finds the materials furnished, work performed, or the finished product is not in full conformity with the plans and specifications but that reasonably acceptable work has been produced, he shall then determine if the work shall be accepted and remain in place. If acceptable, the City Engineer will document the basis of acceptance and provide an amount of compensation to become due to the City for allowing the work to remain in place and the same shall be signed by the Responsible Party and may be taken from the Performance Security. Should the Responsible Party not agree, the Responsible Party will remove and replace or correct the work or materials at its own expense. Items of work that may have an impact on public use or public safety that are accomplished contrary to specifications shall be corrected immediately.

18. REMEDIES FOR SUBSTANDARD WORK AND/OR MATERIALS.

Work which does not conform to the requirements of the plans and specifications will be considered as unacceptable, unless otherwise determined acceptable under the provisions of Section 17. Unacceptable work, whether the result of poor workmanship, use of defective materials, or damage through carelessness or other cause, shall be removed immediately and replaced in an acceptable manner.

19. ACCEPTANCE LIMITATION.

The acceptance of a Public Improvement shall in no way constitute an assumption by the City of liability for defects in the improvement. By accepting the improvement, the City does not warrant or guarantee the Public Improvement has been properly designed or constructed, or waive any claims relating thereto. Any errors or omission of the Responsible Party, its Engineer, or the Contractor shall not be the responsibility of the City.

20. REVISIONS TO THE APPROVED CONSTRUCTION PLANS.

The Responsible Party may revise the approved construction plans as necessary to complete the subdivision improvements, provided the changes are reviewed and approved per the City's standard processes. If the revisions result in increased liability to the City, the City Engineer may withhold Performance Security reductions or require increases in the Performance Security until the Responsible Party completes such work and that work is accepted by the City. If the revisions result in a liability decrease, the Performance Security may be reduced in accordance with Section 5 of this Agreement.

21. RESPONSIBLE PARTY AND/OR CONTRACTOR EMPLOYEES, METHODS, AND EQUIPMENT.

a. Workers:

All workers shall have sufficient skill and experience to perform properly the work assigned to them. Any person employed by the Responsible Party and/or by any Contractor who does not perform assigned work in a proper and skillful manner, or who is intemperate or disorderly, shall be removed from the project forthwith by the Responsible Party upon written order of the City Engineer and shall not be employed again on any portion of the work without the City Engineer's consent. Should the Responsible Party fail to remove such person, or fail to furnish suitable and sufficient personnel for the proper prosecution of the work, the City Engineer may suspend the work until the Responsible Party has complied with the order(s).

b. Methods and Equipment:

- (1) The methods and equipment used by the Responsible Party and/or Contractor shall produce a satisfactory quality of work. Equipment used on any portion of the project shall be such, and its use so regulated, that no serious or irreparable damage to the roadway, adjacent property, or other streets or highways will result from its use. If damage does occur to these areas, suitable repairs shall be made at the Responsible Party's expense.
- (2) When the methods and equipment to be used by the Responsible Party and/or Contractor in accomplishing the construction are not prescribed in the plans, specifications, or standards, the Responsible Party and/or Contractor is free to use any methods or equipment that will accomplish the work in full conformity with the requirements of the approved plans, specifications, and standards, as demonstrated to the satisfaction of the City Engineer.

22. PROTECTION OF VALLEY GUTTERS AND FILLETS.

All fillets and valley gutters shall be protected during paving operations and between placement of lifts to prevent damage. A gravel crossing or other means of ramping shall be placed over all valley gutters during base course placement and shaping operations. All valley gutters shall be protected during asphalt paving operations with gravel, asphalt, wooden plank ramp, or other approved ramping methods.

When the top lift of asphalt is not placed the same construction season as bottom lift or if the top lift is not placed within Two (2) weeks of bottom lift, all valley gutters and fillets shall be ramped with asphalt to protect them from snowplow and other vehicle damage. Any damage to curb and gutter, valley gutters, and/or fillets caused by the lack of adequate ramping shall be repaired at the expense of the Responsible Party and the same shall be a condition of Final Acceptance.

23. MAINTENANCE OF TRAFFIC AND THE PREMISES.

Unless otherwise specified, the Responsible Party shall be solely responsible for maintaining the premises being subdivided in a safe condition and for keeping the project secured from public use until the bottom lift of asphalt concrete is placed. Measures to adequately restrict public access must be used and maintained by the Responsible Party. If the requirements call for public access,

the Responsible Party shall install and maintain appropriate controls as required. The Responsible Party shall be responsible for installation and maintenance of any barricades or warning signs required until Final Acceptance is granted and permanent signage is in place. The Responsible Party shall notify the City Engineer (Ten) 10 business days prior to the need for permanent signage.

Until Final Acceptance is granted, the Responsible Party shall be responsible for maintaining traffic throughout the subdivision. This may include, but is not limited to:

- a. Placement of asphalt concrete to create ramps at fillets, valley gutters, and lift transitions.
- b. Placement of traffic control barriers to indicate the termination of roads.

24. ROADWAY MAINTENANCE RESPONSIBILITIES.

The City will be responsible for snow removal on any street where asphalt or concrete surfacing has been placed prior to Final Acceptance and during the warranty period. Snow removal will be the responsibility of the Responsible Party on any unpaved streets. Any damage to work including the asphalt or concrete surfacing, curb and gutter, fillets, and valley gutters caused to the work exclusively by snow removal operations will not be subject to repair or replacement.

However, the Responsible Party will be responsible for any snow removal damage to valley gutters or fillets caused by inadequate ramping when the top lift of asphalt has not been installed. The City shall not provide snow removal services on streets where manholes, valve boxes, and any other items protrude above the roadway surface.

The Responsible Party will not be responsible for any routine maintenance during the Warranty Period. Routine maintenance includes street sweeping, crack sealing, and seal coating. However, the City is not responsible for street sweeping caused by construction activities in the development.

In the case of an emergency repair where, in the judgment of the City, delay would cause serious loss or damage, repairs may be made without notice being sent to the Responsible Party, and the Responsible Party shall pay the cost thereof.

25. TRANSFER OF RESPONSIBILITY.

In the event of the sale, conveyance, or transfer of the Subdivision or any portion thereof, the City will not release the Responsible Party from its obligations under this Agreement and will continue to hold the Responsible Party responsible for all Public Improvements until a successor in interest to the Responsible Party has posted a suitable Performance Security and/or Warranty Security, as applicable, and entered into an Agreement to Construct Subdivision Improvements with the City. The Responsible Party may also assign over its Performance Security with the written consent of the City, which consent shall not be unreasonably withheld to cover said Public Improvements.

26. FAILURE TO COMPLETE THE REQUIRED IMPROVEMENTS.

In the event the Responsible Party shall fail or neglect to fulfill the obligations under this Agreement, the City shall have the right to construct or cause to be constructed the Public

Improvements specified herein, as shown on the Final Plat and in the plans and specifications as approved, and the Responsible Party shall be liable to pay to and indemnify the City, the total cost to the City thereof including, but not limited to, engineering, attorney fees (both outside and for staff attorneys), and contingent costs together with any damages, either direct or consequential, which the City may sustain on account of the failure of the Responsible Party to carry out and execute all of the provisions of this Agreement and any agreements referenced herein. The City shall have the unconditional right to call upon the Performance or Warranty Security for the purposes specified and in the amounts enumerated herein.

If the Responsible Party fails to or refuses to complete the Public Improvements under the terms of this Agreement by the dates required, the City may upon written notice to Responsible Party at any time (or times) execute against the Performance or Warranty Security for those funds it deems necessary to complete the work - whether by the City, a private company, or a public agency - upon certifying that the Responsible Party has not completed the Public Improvements. The certification shall be made by a notarized statement signed by the City Engineer or his designated agent.

If the City takes over the completion of the Public Improvements because of the Responsible Party's failure or refusal to complete the same, and if the bond, escrow, or letter of credit posted is insufficient to complete the Public Improvements and cover the Warranty Security, the Responsible Party shall be liable to the City upon demand for the additional funds necessary to complete or repair the Public Improvements according to the plans and specifications.

If the City performs, or has performed on its behalf by a private company or a public agency, the Public Improvements specified in the plans and specifications, and if the final costs of the Public Improvements to the City including, but not limited to, administrative costs, is less than the amount drawn against the bond or letter of credit after withholding a sum sufficient to cover the Warranty Security, then the City shall refund the excess to the Responsible Party or surety within 30 days from completion and acceptance of the Public Improvements.

27. BREACH OF AGREEMENT.

- a. The following non-inclusive list shall constitute a breach of this Agreement:
 - (1) Failure by the Responsible Party to complete the Public Improvements within the contract period or any extension thereof.
 - (2) Failure or refusal by the Responsible Party to comply with an order of the City Engineer within a reasonable time.
 - (3) Responsible Party's disregard of laws, ordinances, or instructions of the City Engineer.
 - (4) Failure or refusal by the Responsible Party to remove rejected materials.
 - (5) Failure or refusal by the Responsible Party to replace, perform anew, or correct any defective or unacceptable work.
 - (6) Bankruptcy or insolvency of the Responsible Party, or the making of an assignment for the benefit of creditors by the Responsible Party.

(7) Failure by the Responsible Party to carry on the work in an acceptable manner.

(8) Any other breach of a material provision of this Agreement.

Upon Responsible Party's breach, the City shall be entitled to give notice of default to the Responsible Party and security provider, if any. The notice of default shall indicate how the Responsible Party has breached and shall indicate what action the Responsible Party must take to cure such breach. The Responsible Party shall have Fifteen (15) days to take substantial action to cure such breach or appeal pursuant to Sections 30.040 through 30.046 of the Code of Ordinances of Sioux Falls, South Dakota.

- b. If the Responsible Party does not, within the time for cure provided in the notice of default, take substantial action to cure such breach, the Responsible Party shall, at the written direction of the City Engineer, relinquish possession and control of the work, and the City shall thereupon have full power and authority, to terminate the contract, to take over the completion of the work, to enter into agreements with others for the completion of said contract according to the terms and provisions thereof, or to use such other methods as in the City's opinion may be required for the performance of said contract, or completion of Public Improvements, in an acceptable manner.
- c. The Responsible Party and its security provider shall be liable for all outlay and expense incurred by the City, together with the costs of completing the Public Improvements, and such costs may be deducted from any monies due or which may become due to the Responsible Party. In case such outlay and expense exceeds the sum that would have been payable under the Warranty Security, or to the extent said Warranty Security fails to make payments, the Responsible Party shall be liable for and shall pay to the City the amount of said sums.
- d. Neither the City, nor any officer, agent, nor employee thereof, shall be in any way liable or accountable to the Responsible Party or the Responsible Party's security provider for the method by which the completion of said Public Improvements, or any portion thereof, may be accomplished, or for the price paid therefore. Neither by taking over the work nor by declaring a default, shall the City forfeit the right to recover damages from the Responsible Party for failure to complete the Public Improvements.

CITY OF SIOUX FALLS:

Mayor

Date

Printed Name

ATTEST:

City Clerk

Printed Name