

This Agreement dated and effective as of the ___ day of _____, 2018.

Project Agreement Identification Number # 254OA0051

FUNDING AGREEMENT

23239-0000 Okanagan Highway No. 97 – Six Laning Highway 33 to Edwards Road

BETWEEN:

Her Majesty the Queen in the Right of the Province of British Columbia,
as represented by **the MINISTER OF TRANSPORTATION & INFRASTRUCTURE**

342 - 447 Columbia Street
Kamloops BC V2C 2T3
(the “**Ministry**”)

AND:

City of Kelowna
1435 Water Street
Kelowna BC V1Y 1J4
(the “**City**”)

Background:

- A. The Ministry and the City wish to complete widening of Highway 97 to six lanes between Highway 33 and Edwards Road, together with intersection improvements and related infrastructure improvements.
- B. The City is the owner of all other roads intersecting Highway 97 between Highway 33 and Edwards Road. The Ministry is the owner of Highway 97.
- C. The City wishes the Ministry to complete additional municipal works as part of the Work, at the City’s cost.
- D. The Ministry has entered into the Contract with the Contractor for construction of the Work, including but not limited to the following:
 - a. Approximately 4.5km of widening Highway 97 from four to six lanes between Highway 33 and Edwards Road including upgrades to four major intersections: Leathead Road, McCurdy Road, Findlay Road and Sexsmith Road;
 - b. Installation of a new traffic signal at the intersection of Findlay Road and Loyd Road;
 - c. Extension of Totom Avenue near Findlay/Hollywood intersection to the City standard two-lane road;

- d. Re-alignment of Rutland Road approximately 603 metres north, to align with Acland Road at Old Vernon Road by means of a new roundabout intersection;
- e. Completion of Jenkins Road from Commerce Avenue to Enterprise Road (approximately 270 metres) to the City standard two-lane road, including underground utilities and street lights, urbanization;
- f. Urbanization to City standards, including curb and gutter and concrete sidewalk installation along Highway 97 from Highway 33 to Fenwick Road;
- g. Relocation of the existing McCurdy southbound and northbound BC Transit Rapid Bus stops, and construction of a new BC Transit Rapid Bus stops at Sexsmith Road and new and relocated local bus stops as set out in the Design;
- h. Utility relocations and upgrades; and
- i. Relocation of the “Welcome to Kelowna” entrance sign
- j. Replacement landscaping or reasonable compensation for replacement landscaping.

Agreement:

For good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by each Party to the other, the Parties agree as follows:

1. Definitions

- 1.1. **City** means the City of Kelowna;
- 1.2. **City Work** means all portions of the Work related to the design and construction of upgrades and improvements to City infrastructure, as described in paragraph 2.1 and as identified in Appendix A and in the Design;
- 1.3. **Contract** means the contract or contracts for the construction of the Work;
- 1.4. **Contractor** means the party or parties with which the Ministry has entered into the Contract for construction of the Work;
- 1.5. **Design** means the specifications for the Work as shown in Appendix B and as described herein;
- 1.6. **Estimate** means the estimate of the cost of the City Works set out in paragraph 2.1;
- 1.7. **Licence** means the licence of occupation granted by the City to the Ministry in paragraph 3.4;
- 1.8. **Ministry** means Her Majesty the Queen in the Right of the Province of British Columbia, as represented by the Minister Of Transportation & Infrastructure; and
- 1.9. **Work** means all work performed by the Contractor related to the widening of Highway 97 to six lanes between Highway 33 and Edwards Road, together with intersection improvements and related infrastructure improvements, including all work set out in the Design.

2. Payment for the City Works

2.1. The City agrees to pay the Ministry its actual incurred costs for the City Work, whether performed before or after the execution of this Agreement, including but not limited to costs related to the following:

- a) replacement of the City sanitary works between Fenwick Road and Stremel Road;
- b) extension of sanitary sewer works along Jenkins Street;
- c) construction of any sidewalk that is not replacement of existing sidewalk, and is not required by the Ministry;
- d) Re-grading of property number P015, Chrysler Dealership, as identified on Drawing R2-924-103 of Appendix B;
- e) extension of the Mayfair storm works;
- f) any work related to communications conduits;
- g) work related to the McCurdy Sanitary works;
- h) work related to the McCurdy Storm works; and
- i) costs incurred for engineering services, design consultants, and City utility relocation,

minus a credit to the City for the cost of relocating its “Welcome to Kelowna” signage, in the amount of \$100,000.00. The parties estimate that such costs will amount to **\$926,398.42** net of the signage credit (the “**Estimate**”), but final amounts payable will be based on actual quantities, tender prices, and any other charges submitted by the Contractor for the Work.

2.2. The City will pay to the Ministry all amounts due hereunder for City Work as completed and accepted by the City, within 30 days of receipt of an invoice by the Ministry, unless otherwise agreed by the parties in writing.

2.3. If the costs for the City Work exceed the Estimate by more than 10%, then the City may confirm in writing to the Ministry that it wishes to consider a reduction in the scope of the City Works.

2.4. In the event the City provides written confirmation under clause 2.3, then any such reduction or amendments must first be agreed upon by the Ministry and the Ministry must reach agreement with the Contractor regarding the changes to the City Works before any such change is effected. If the Ministry does not agree to the changes, the City will be responsible for the costs of the City Work completed as per the original scope of work.

2.5. If the City wishes a change to be made to the scope of the City Works or the completion date for the Project described in the Contract, the City must make the request to the Ministry in writing with a full description of the proposed change. The City will provide sufficient

information in order for the Ministry to reasonably identify the components of the change and calculate the estimated additional costs (if any) thereto. Additional costs as a result of the changes requested will be paid for by the City.

3. City's Obligations

- 3.1. The City represents that all required approvals and permits have been issued to proceed with the City Work.
- 3.2. The City agrees to execute a road dedication plan, without additional consideration, to dedicate as municipal road and arterial highway any City owned lands required for the Rutland Road realignment.
- 3.3. The City will be responsible for the maintenance of City Work from and after Substantial Completion (as defined in the Contract).
- 3.4. The City will appoint a City liaison for this project to coordinate all the City's reviews and approvals. The City will also provide any necessary staff time required to review and facilitate the design and construction processes.
- 3.5. The City grants to the Ministry a non-exclusive right to enter upon and occupy (the "Licence") lands owned by the City including municipal roads for the purposes of this Agreement on the following terms and conditions:
 - a) the Licence commences on the date construction commences on the Work, and terminates upon the end of the Contract's warranty period;
 - b) the Ministry is entitled to sub-licence the Licence on the same terms and conditions as the Licence to the Contractor or others working on the Work on behalf of the Ministry.

4. Ministry Obligations

- 4.1 The Ministry will assign a Project Manager and Ministry personnel to the project team and provide contract administration, construction supervision and quality assurance services during construction.
- 4.2 The Ministry will liaise with the City on an ongoing basis during the project to ensure the City Works are delivered in accordance with the Design.

5. Dispute Resolution

- 5.1 If any dispute arises under this Agreement, the Parties will attempt to resolve the dispute within 14 days of the dispute arising (or within such other time period agreed to by the Parties in writing) through amicable negotiations, failing which, the Parties will resolve the dispute as follows by referring the matter to the following representatives of the Ministry and the City for resolution:

- a) the City Infrastructure Divisional Director; and
- b) the Director, Major Projects of the Ministry of Transportation and Infrastructure,

and, subject to applicable laws, the Parties will provide candid and timely disclosure to each other of all relevant facts, information and documents to facilitate the resolution of the dispute.

- 5.2. If a dispute under this Agreement is not resolved under paragraph 5.1 within 7 days of the dispute being referred to the persons identified in paragraph 5.1, or within such other time period agreed to in writing by the Ministry and the City, a Party may refer the dispute to arbitration conducted by a sole arbitrator appointed under the *Arbitration Act*.
- 5.3. The cost of the arbitration referred to in paragraph 5.2 will be shared equally by both Parties and the arbitration will be governed by the laws of the Province of British Columbia.
- 5.4. The arbitration will be conducted at the location agreed upon by both Parties.
- 5.5. The Parties agree that nothing contained in this Agreement will constitute a precondition so as to preclude any Party from commencing legal proceedings in the Courts of British Columbia where such proceedings are necessary to preserve any applicable limitation period.

6. Miscellaneous

- 6.1 All information, material and documentation relating to the Project that is in the custody or control of any Party is subject to the *Freedom of Information and Protection of Privacy Act* and, except where the disclosure is to be made to the other Party, each Party will provide the other with notice under the *Freedom of Information and Protection of Privacy Act* prior to any release of any such information, material or documentation.
- 6.2 Time is of the essence of this Agreement.
- 6.3 All notices, documents or communications among the Parties that are required or permitted to be given under this Agreement must be in writing and will be deemed to have been given on the first business date of the recipient following delivery by hand or facsimile to the Party to whom it is to be given as follows:
 - a) to the Ministry:
 - Ministry of Transportation and Infrastructure
 - 300 – 1358 St Paul Street
 - Kelowna, BC V1Y 2E1
 - Attention: Lindsay Stringer
 - Phone Number: (250) 712 - 3625
 - Facsimile Number: (250) 712-3669
 - b) to the City:
 - City of Kelowna

1435 Water Street
Kelowna, BC V1Y 1J4
Attention: Andrew Albiston
Phone Number: (250) 469 - 8569

provided, however, that a Party may, by notice in writing to the other, specify another address for service of notices under this Agreement and, where another address is specified by a Party, notice must be delivered to that address in accordance with this Section.

- 6.4 Delivery of all material, documents and plans to be delivered to a Party in accordance with the terms of this Agreement will be effected by hand or courier to the address specified above, such deliveries to be effective only on actual receipt.
- 6.5 The warranties, representations and agreements contained in this Agreement will not be subject to merger but will survive the completion of the Project.
- 6.6 This Agreement constitutes the entire agreement between the Parties with respect to the completion of the Project and may not be modified except by subsequent agreement in writing.
- 6.7 No term, condition, covenant or other provision of this Agreement will be considered to have been waived by a Party unless such waiver is expressed in writing by the Party. The waiver by a Party of any breach by the other of any term, condition, covenant or other provision of this Agreement will not be construed as or constitute a waiver of any further or other breach of the same or any other term, condition, covenant or other provision and the consent or approval of a Party to any act by the other Party requiring the consent or approval of the Party will not be considered to waive or render unnecessary such consents or approvals to any subsequent same or similar act by the other Party.
- 6.8 No remedy conferred upon or reserved to any Party is exclusive of any other remedy in this Agreement or provided by law, but such remedy will be cumulative and will be in addition to any other remedy in this Agreement or now or hereafter existing at law, in equity or by statute.
- 6.9 This Agreement is binding upon and enures to the benefit of the Parties and their successors and permitted assigns.
- 6.10 The Parties will perform such further acts and execute such further documents as may reasonably be required to give effect to this Agreement.
- 6.11 The Schedules to this Agreement form part of this Agreement.
- 6.12 Wherever this Agreement provides that an action may be taken, a consent or approval must be obtained or a determination must be made, then such Party will act reasonably in taking such action, deciding whether to provide such consent or approval or making such determination; but where this Agreement states that a Party has sole discretion to take an action, provide a consent or approval or make a determination, there will be no requirement to show

reasonableness or to act reasonably in taking that action, providing that consent or approval or making that determination.

- 6.13 This Agreement will be interpreted according to the laws of the Province of British Columbia.
- 6.14 Nothing in this Agreement fetters or limits the exercise of discretionary authority as set out in applicable Laws.
- 6.15 In this Agreement, "person" includes a corporation, firm or association and wherever the singular or masculine form is used in this Agreement it will be construed as the plural or feminine or neuter form, as the case may be, and vice versa where the context or Parties so require.
- 6.16 Where there is a reference to an enactment of the Province of British Columbia or of Canada in this Agreement, that reference will include a reference to any subsequent enactment of the Province of British Columbia or Canada, as the case may be, of like effect and, unless the context otherwise requires, all statutes referred to in this Agreement are enactments of the Province of British Columbia.
- 6.17 If any section of this Agreement or any part of a section is found to be illegal or unenforceable, that part or section, as the case may be, will be considered separate and severable and the remaining parts or sections, as the case may be, will not be affected and will be enforceable to the fullest extent permitted by law.
- 6.18 The assignment, mortgage or transfer of this Agreement by any Party does not release such Party from its obligation to observe and perform all the provisions of this Agreement on its part to be observed and performed unless the other Parties specifically release such Party from such obligation in its consent to the assignment, mortgage or transfer of this Agreement.
- 6.19 If, due to a strike, lockout, labour dispute, act of God, inability to obtain labour or materials, law, ordinance, rule, regulation or order of a competent governmental authority, enemy or hostile action, civil commotion, fire or other casualty or any condition or cause beyond the Ministry's reasonable control, the Ministry is delayed in performing any of its obligations under this Agreement, the time for the performance of that obligation will be extended by a period of time equal to the period of time of the delay.
- 6.20 The Parties agree that nothing in this Agreement constitutes any of them as the agent, joint venturer or partner of the other Party or gives any of them any authority or power to bind the other Party in any way.
- 6.21 This Agreement may be executed in counterparts and when the counterparts have been executed by the Parties, each originally executed counterpart, whether a facsimile, photocopy or original, will be effective as if one original copy had been executed by the Parties to this Agreement.

The Parties have executed this Agreement as of

_____, 2018

Signed on behalf of Her Majesty the Queen
in the right of the Province of British
Columbia, as represented by the Minister
of Transportation and Infrastructure on

_____, 2018

Murray Tekano, Director, Major Capital Projects

Signed on behalf of the City of Kelowna
on

_____, 2018

Colin Basran, Mayor

Stephen Fleming, City Clerk