

**AGREEMENT BETWEEN CITY OF RAPID CITY AND DESTINATION RAPID CITY  
FOR CONSTRUCTION AND DEVELOPMENT OF MEMORIAL PARK PROMENADE**

This Agreement is entered into effective the \_\_\_\_\_ day of \_\_\_\_\_, 2012, by and between the **City of Rapid City** (hereinafter "City"), a municipal corporation, of 300 Sixth Street, Rapid City, South Dakota 57701, and **Downtown Rapid City Economic Development Corporation**, a South Dakota corporation, d/b/a Destination Rapid City, of 512 Main Street, Suite 100, Rapid City, South Dakota 57701 (hereinafter "DRC").

WHEREAS, DRC wishes to construct and fund improvements to Memorial Park known as the Memorial Park Promenade; and

WHEREAS, DRC has submitted to the Common Council a proposed design for the Memorial Park Promenade prepared for DRC by Wyss Associates, Inc.; and

WHEREAS, the Memorial Park Promenade is intended to provide for space for walking, biking, picnicking, and social gatherings for city residents and for out-of-town tourists in Memorial Park; and

WHEREAS, the Memorial Park Promenade will also provide an improved walking experience to connect Sixth Street in downtown Rapid City with the Rushmore Plaza Civic Center; and

WHEREAS, the Memorial Park Promenade will improve pedestrian and bike traffic across Omaha Street and encourage people who are either downtown or at the Civic Center to cross Omaha Street; and

WHEREAS, DRC desires to solicit bids for construction of the Memorial Park Promenade and coordinate its construction with the City; and

WHEREAS, DRC desires to expend its own funds to pay for all construction costs of the Memorial Park Promenade; and

WHEREAS, City desires to give DRC access to Memorial Park and to permit DRC to construct these improvements to Memorial Park; and

WHEREAS, City desires to be responsible for all maintenance once the Memorial Park Promenade is fully constructed; and

WHEREAS, City recognizes the benefit to its citizens and city visitors from construction of the Memorial Park Promenade, believes that construction of the Memorial Park Promenade is in the best interests of the community, and believes that its construction and maintenance will enhance the quality of life in the City; and

WHEREAS, the parties mutually desire to reduce their understandings and agreements to writing by executing this Agreement.

**WITNESSETH:**

NOW, THEREFORE, in consideration of the promises and mutual covenants herein contained and other good and valuable consideration, the receipt of which is hereby acknowledged, it is hereby agreed as follows:

1. Incorporation of Recitals. The aforementioned recitals are incorporated herein by reference as if more fully set forth hereinafter.

2. DRC's Obligations and Rights. DRC hereby agrees to perform all of the following, or guarantee performance of the following at DRC's direction, at its own expense, related to the Memorial Park Promenade ("the Project"):

- a. Solicit bids for the construction of the Project, conduct a selection process for submitted bids, and select a Project contractor(s) and subcontractors as needed for the Project;
- b. Budget a sufficient amount to cover the cost of the Project, including possible change orders, and provide adequate funding to complete the Project;
- c. Obtain all necessary permits, licenses, and authorization required by municipal, county, state, and federal authorities for construction of the Memorial Park Promenade;
- d. Set up and keep in good order separate, accurate and adequate accounting records for the Project and maintain orderly files containing bids, bonds and sureties, insurance policies, correspondence, receipted bills and vouchers, and all other documents pertaining to the Project;
- e. Supervise and direct the construction of the Project efficiently and with proper economy, with the involvement of City as otherwise provided in this Agreement, and substantially in accordance with the design plan DRC provided to City;
- f. Ensure that construction of the Project adheres to any and all relevant requirements found in the Standard Specifications & Details, 2007, and the Infrastructure Design Criteria Manual – 2012, as adopted by City;
- j. Require the Project contractor to provide a Performance Bond which is i) equal to or greater than the bid price for the Project, and ii) includes City as an additional beneficiary of the Performance Bond, or otherwise ensure that sufficient surety is put in place to protect City's interests in construction and completion of the Project;
- k. Ensure that the Project contractor and architect obtain liability insurance as required within the Standard Specifications adopted by the City; require that any and all liability insurance policies obtained by any contractor, architect, subcontractor, or other entity involved with the Project name the City as an additional insured; and

require that any entity securing liability insurance furnish to City evidence of the same by a certificate of insurance;

- l. Make its best efforts to coordinate the Project with other work City is conducting within Memorial Park, including installation of underground sprinklers within Memorial Park;
  - m. Pay for any and all expenses for the Project's design and construction;
  - n. Ensure that its agreement with the Project contractor and/or architect state that the agreement is for the direct and primary benefit of City as a third-party beneficiary to the contract with the right and ability to enforce the contract, including enforcing the obligations of the Project contractor and/or architect; and
  - o. Transfer all rights and obligations to City on the date of acceptance.
3. City's Obligations and Rights. City hereby agrees to do the following:
- a. Permit and allow DRC to access Memorial Park as needed to construct the Project within Memorial Park and to otherwise complete its obligations under this Agreement;
  - b. Communicate regularly with DRC and participate with regular meetings regarding Project progress, changes to Project, financial status of Project, etc.;
  - c. Assist DRC in obtaining necessary City permits and licenses for the Project; and
  - d. Assume all responsibility for the Project up to the date of acceptance as defined below.
4. Ownership of Project. The parties agree that any and all improvements made to Memorial Park will be owned by City.
5. Consultation and Design Changes. DRC and City agree to consult each other on a regular basis throughout construction of the Project regarding construction progress, proposed changes to design, financial status of the Project, etc. City names the Director of Parks & Recreation or their designee as its primary point of contact on the Project, and DRC agrees to direct any and all communications with City to this individual or his/her designee.

DRC agrees to coordinate regular Project meetings during construction no less than twice monthly with representatives from DRC, City, contractor, designer, and other primary parties regarding such things as construction progress and any changes to design.

In the event a conflict arises between DRC and City with regard to design of the Project, the parties agree that City has the authority to make the final decision.

6. Construction Payments From Escrow Fund. DRC agrees to place an amount equal to or greater than the successful bid for the Project in an escrow account prior to the Project's groundbreaking. DRC agrees to provide City with proof of the escrow account balance prior to the Project's groundbreaking.

DRC agrees to check all bills received for services, work and supplies ordered in connection with the Project. Before making payment, DRC agrees to route requests for payment to City's Finance Officer for her review. City agrees to conduct this review of expenses in a timely manner. Upon notification of completion of the Finance Officer's review, DRC agrees to timely pay all expenses from the escrow account on all expenses deemed appropriate by DRC and City.

7. Acceptance of Project. Upon notification from DRC of completion of construction of the Project, City shall satisfy itself by examination that the work has been finally and fully completed in accordance with this Agreement and the relevant plans and Specifications. If, during such examination, City finds that work on the Project is incomplete or unsatisfactory, it shall note such work in a punch list and provide the same to DRC. DRC agrees to ensure that the work on the punch list is completed or that some other solution is reached which is satisfactory to City, after which City will conduct another examination. This process of examination, punch list, and work completion will be completed as many times as necessary. City agrees that it will not unreasonably withhold acceptance of the Project.

Once City has satisfied itself by examination that the work has been finally and fully completed in accordance with this Agreement and the relevant Specifications, it shall provide written notice to DRC of its acceptance of the Project. As of the date of acceptance, City agrees to take over any and all responsibilities for the Memorial Park Promenade.

8. Warranty Period. DRC shall require that the Project contractor warrant and guarantee its work against defective workmanship and materials for a period of two (2) years, commencing on the date of the City's acceptance of the work as described in Section 7. DRC agrees to require the Project contractor to correct any construction defects or incomplete work identified by City during the Warranty Period at the contractor's sole expense.

DRC shall require that the Project contractor obtain a warranty bond, or other equivalent surety, in an amount equal to ten percent (10%) of the total cost of the Project to secure the warranty during the Warranty Period. DRC shall ensure that the warranty bond includes City as an additional beneficiary and that the City is otherwise able and empowered to execute on the warranty bond.

City agrees to make a warranty inspection(s) within the Warranty Period. DRC and the Project contractor at their option if desired may be present during the warranty inspection(s) by City.

9. Joint and Several. DRC agrees that if it fails to fulfill its obligations within this agreement which concern (i) its contract(s) with Project contractor or others, (ii) the obligations or responsibilities Project contractor or others agree to undertake, (iii) performance and warranty bonds Project contractor is to obtain, (iv) liability insurance any party, including Project contractor,

is to obtain, or (v) project construction, that DRC will be jointly and severally liable for any and all injury or damage to City which results from such failures.

10. Artwork and Sculptures. City agrees that DRC shall have access to Memorial Park during and after the Project for the purposes of installing, maintaining, removing, and replacing artwork and/or sculptures within the Promenade. DRC agrees to obtain approval of City for the design and placement any such artwork/sculptures prior to installation. DRC agrees to pay for, or to arrange for payment of, any and all such artwork/sculptures, and DRC agrees that City will not be responsible for any costs associated with the artwork/sculptures or their installation.

11. Independent Contractor. Nothing contained herein shall be construed as creating a partnership or joint venture between City and DRC, nor construed as making DRC anything other than an independent contractor of City. DRC shall have no right or power to act for City other than as contemplated in this Agreement or otherwise expressly authorized by City.

12. Costs and Expenses. The parties shall pay all of their own costs and expenses incurred in connection with performance of its duties hereunder.

13. Financial Statements and Audit. DRC agrees to provide City with quarterly financial statements, which shall show, at minimum, an itemization of all Project expenses and the current balance in DRC's escrow account, discussed in Section 6. City shall have the right to inspect all of DRC's financial records relating to the Project, and shall have the option of ordering an audit by the auditor of the City's choosing.

14. Waivers. No waiver of any breach of any of the terms or conditions of this Agreement shall be held to be a waiver of any other subsequent breach; nor shall any waiver be valid or binding unless the same shall be in writing and signed by the party alleged to have granted the waiver.

15. Consideration. The parties agree that the City's act of allowing DRC to access Memorial Park and construct the Project within Memorial Park constitutes sufficient good and valuable consideration for DRC's promises made within this Agreement and for the execution and performance of this Agreement.

16. Miscellaneous Provisions.

- a. **GOVERNING LAW AND VENUE.** This Agreement shall be governed by and construed in accordance with the laws of the State of South Dakota without regard for its conflict of laws provisions. The parties agree to bring any suit at law or equity only in Seventh Judicial Circuit Court in Pennington County, South Dakota.
- b. **TITLES AND CAPTIONS.** All section titles or captions contained in this Agreement are for convenience only and shall not be deemed part of the context nor affect the interpretation of this Agreement.

- c. **PRONOUNS AND PLURALS.** All pronouns and any variations thereof shall be deemed to refer to the masculine, feminine, neuter, singular or plural as the identity of the person or persons may require.
- d. **ENTIRE AGREEMENT.** This Agreement contains the entire understanding between and among the parties and supersedes any prior understandings and agreements among them respecting the subject matter of this Agreement. Any amendments to this Agreement must be in writing and signed by the party against whom enforcement of that amendment is sought.
- e. **AGREEMENT BINDING.** This Agreement shall be binding upon the heirs, executors, administrators, successors and assigns of the parties hereto.
- f. **CONSTRUCTION.** This Agreement or any section thereof shall not be construed against any party due to the fact that said Agreement or any section thereof was drafted by said party.
- g. **NOTICES.** Any notice or other communication required or permitted hereunder shall be in writing and shall be deemed to have been given, when received, if delivered by hand or by facsimile transmission, and when deposited, if placed in the mails for delivery by air mail, postage prepaid, addressed to the appropriate party as specified on the first page of this Agreement. Addresses may be changed by written notice given pursuant to this Section, however any such notice shall not be effective, if mailed, until three (3) working days after depositing in the mails or when actually received, whichever occurs first.
- h. **FURTHER ACTION.** The parties hereto shall execute and deliver all documents, provide all information and take or forbear from all such action as may be necessary or appropriate to achieve the purpose of the Agreement.
- i. **COUNTERPARTS/EFFECTIVE DATE.** This Agreement may be executed in several counterparts and all so executed shall constitute one Agreement, binding on all the parties hereto even though all the parties are not signatories to the original or the same counterpart. Furthermore, regardless of the actual day of execution, this Agreement shall be effective as of the date set forth herein.
- j. **SEVERABILITY.** If any provision of this Agreement, or the application of such provision to any person or circumstance, shall be held invalid, the remainder of this Agreement, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

IN WITNESS WHEREOF, each of the parties hereto has caused this Agreement to be executed in the manner appropriate to each, to be effective as set forth herein.

**DESTINATION RAPID CITY**

By \_\_\_\_\_  
Dan Senftner, President

**CITY OF RAPID CITY**

By \_\_\_\_\_  
Sam Kooiker, Mayor

(SEAL)

ATTEST:

\_\_\_\_\_  
Finance Officer