

Intergovernmental Agreement
for the
**Design, Rights-of-Way Acquisition, Utility Relocations, Construction, Construction
Management and Operation and Maintenance**
of the
2nd Avenue and Spencer Project
between the
City of Mesa
and the
Flood Control District of Maricopa County
IGA FCD 2022A023
Agenda Item _____

This Intergovernmental Agreement (this “Agreement”) is entered into by and between the Flood Control District of Maricopa County, a political subdivision of the State of Arizona, acting by and through its Board of Directors (the “DISTRICT”), and the City of Mesa, a municipal corporation, acting by and through its Mayor and CITY Council, (the “CITY”). The CITY and the DISTRICT are collectively referred to as the PROJECT PARTNERS and as a PROJECT PARTNER.

This Agreement shall become effective as of the date it has been executed by all PROJECT PARTNERS.

STATUTORY AUTHORIZATION

1. The DISTRICT is empowered by Arizona Revised Statutes (A.R.S.) § 48-3603, as revised, to enter into this Agreement and has authorized the undersigned to execute this Agreement on behalf of the DISTRICT.
2. The CITY is empowered by A.R.S. § 9-240(B) and A.R.S. §11-952, as amended, to enter into this Agreement and has authorized the undersigned to execute this Agreement on behalf of the CITY.

BACKGROUND

3. On October 19, 2022 the Board of Directors of the DISTRICT (the Board) adopted Resolution FCD 2022R003 (C-69-23-009-X-00) authorizing the DISTRICT to cost-share in projects recommended under the DISTRICT’s Small Project Assistance Program.
4. Under the DISTRICT’s Small Project Assistance Program for Fiscal Year 2024, the CITY proposed the 2nd Avenue and Spencer Project (the “PROJECT”) to provide the following benefits:
 - 4.1 Reduce the flood hazard to property that has experienced historic flooding.

5. The PROJECT has been recommended by DISTRICT staff for the Fiscal Year 2024 program.

PURPOSE OF THE AGREEMENT

6. The purpose of this Agreement is to identify and define the responsibilities of the DISTRICT and the CITY for the design, rights-of-way acquisition, utility relocations, construction, construction management, and operation and maintenance of the PROJECT.

TERMS OF AGREEMENT

7. The PROJECT shall mean the features required to accomplish the benefits enumerated in paragraph 4 of this Agreement. Features of the PROJECT, as envisioned at the time of this Agreement, are represented in Exhibit A but are subject to change without amendment to this Agreement.

8. PROJECT DESIGN AND CONSTRUCTION COST shall mean the actual amount of money required to complete the flood control features of the PROJECT that are completed and invoiced by the CITY to the DISTRICT between July 1, 2023 and June 30, 2025.

- 8.1 The following costs are expressly excluded from the PROJECT DESIGN AND CONSTRUCTION COST shared under this Agreement:

- 8.1.1 Costs associated with rights-of-way acquisition, permitting, construction management (including materials testing and survey work), operations and maintenance.

- 8.1.2 Costs associated with multi-use, landscaping or aesthetic features.

- 8.1.3 Costs associated with utility conflicts and utility relocations.

- 8.2 The PROJECT DESIGN AND CONSTRUCTION COST is estimated to be \$600,005, but is subject to change without amendment to this Agreement.

9. The DISTRICT shall:

- 9.1 Fund seventy-five percent (75%) of the PROJECT DESIGN AND CONSTRUCTION COST incurred and invoiced between July 1, 2023 and June 30, 2025, with the funding from the DISTRICT limited to a maximum of \$1,000,000 in accordance with the DISTRICT's Small Project Assistance Program. The DISTRICT's current estimated funding share is \$450,004. DISTRICT funds will be from the DISTRICT's secondary tax levy revenues and DISTRICT funding shall be contingent upon the availability of DISTRICT Capital Improvement Program Budget funding. This term shall not be amended.

- 9.2 Reimburse the CITY per the terms of this Agreement within thirty (30) days of receipt of an invoice from the CITY for its share of the PROJECT DESIGN AND CONSTRUCTION COST.

- 9.3 Participate in a final inspection of the completed PROJECT with the CITY.

10. The CITY shall:

- 10.1 Fund the full PROJECT DESIGN AND CONSTRUCTION COSTS not reimbursed by the DISTRICT, making the CITY's estimated PROJECT DESIGN AND CONSTRUCTION COST share \$150,001 and CITY will fully fund all PROJECT costs for any work completed and invoiced before July 1, 2023 or after June 30, 2025.
- 10.2 Fully and solely pay any payment required that does not fall within the definition of PROJECT DESIGN OR CONSTRUCTION COST.
- 10.3 Serve as the lead agency for all aspects of PROJECT implementation.
- 10.4 Invoice the DISTRICT as follows:
 - 10.4.1 Within thirty (30) days of award of a PROJECT construction contract for one-half (1/2) of its share of the PROJECT DESIGN AND CONSTRUCTION COSTS.
 - 10.4.2 Within thirty (30) days of completion of construction of the PROJECT, but no later than June 30, 2025, prepare a final accounting including change order costs not previously paid, and invoice the DISTRICT for the remainder of its share of the PROJECT DESIGN AND CONSTRUCTION COST incurred, if any, to date.
- 10.5 Reimburse the DISTRICT for any previous over-payments.
- 10.6 Design the PROJECT, provide PROJECT plans and specifications to the DISTRICT (including interim submittals as appropriate) for review and comment. The DISTRICT shall provide, within three (3) weeks of receipt of the plans and specifications from the CITY, comments on the plans and specifications, if any. The CITY shall incorporate the comments provided by the DISTRICT into the PROJECT as appropriate.
- 10.7 Coordinate and staff any necessary public involvement activities related to the PROJECT.
- 10.8 Obtain all permits required for the PROJECT.
- 10.9 Obtain rights-of-way required for the PROJECT.
- 10.10 Relocate conflicting utilities.
- 10.11 Construct the PROJECT, provide construction management (including materials testing and survey work), and provide any proposed construction change orders to the DISTRICT for concurrence.
- 10.12 Coordinate a final inspection of the completed PROJECT with the DISTRICT.
- 10.13 Own the completed PROJECT and be responsible for operation and maintenance of the completed PROJECT. The maintenance activities to be performed include, but are not limited to, maintaining the flood control function of the PROJECT, including sediment and vegetation removal and any and all aesthetic, park, and public use features, maintenance of landscaping, irrigation, multi-use trails and berms, removal of trash and debris, electricity and other operation costs for the facilities, vandalism repair and replacement, and structural repair and replacement of the flood control structures. The

CITY may delegate this responsibility to a third party but will remain ultimately accountable to the DISTRICT under this Agreement.

10.14 On an annual basis, commencing on the first anniversary date of the completion and acceptance of the project, provide written notification to the DISTRICT that the project has been properly maintained by the City of Mesa over the past year in accordance with the project design intent and to ensure proper hydraulic function.

10.15 Require that any contractor selected for the PROJECT:

10.15.1 Warrant its compliance with all federal immigration laws and regulations that relate to its employees and their compliance with A.R.S. § 23-214(A);

10.15.2 Agree that a breach of the warranty under paragraph 10.15.1 shall be deemed a material breach of contract and is subject to penalties up to and including termination of the contract;

10.15.3 Agree that the DISTRICT retains the legal right to inspect the papers of the contractor or subcontractor employee(s) who work(s) on this Agreement to ensure that contractor or subcontractor is complying with the warranty under paragraph 10.15.1;

10.15.4 Who engages in for-profit activity and has 10 or more employees, certify it is not currently engaged in, and agrees for the duration of this Agreement to not engage in, a boycott of goods or services from Israel. This certification does not apply to a boycott prohibited by 50 U.S.C. Section 4842, or a regulation issued pursuant to 50 U.S.C. Section 4842.

10.15.5 Warrant and certify that it does not currently, and agrees for the duration of the contract that it will not, use:

10.15.5.1 The forced labor of ethnic Uyghurs in the People's Republic of China.

10.15.5.2 Any goods or services produced by the forced labor of ethnic Uyghurs in the People's Republic of China.

10.15.5.3 Any contractors, subcontractors, or suppliers that use the forced labor or any goods or services produced by the forced labor of ethnic Uyghurs in the People's Republic of China.

If the Contractor becomes aware during the term of the Agreement that the Contractor is not in compliance with this paragraph, the Contractor shall notify the County within five (5) business days after becoming aware of the noncompliance. Failure of the Contractor to provide a written certification that the Contractor has remedied the noncompliance within one hundred eighty (180) days after notifying the public entity of its noncompliance shall result in the termination of this Agreement unless the Term of this Agreement shall end prior to said one hundred eighty (180) day period.

11. Any local permits required for the PROJECT that are issued by either PROJECT PARTNER shall be issued at no cost to the PROJECT.

12. Either PROJECT PARTNER may, with mutual written agreement of all PROJECT PARTNERS, delegate responsibilities to another party. Any delegation, however, shall not relieve the delegating PROJECT PARTNER of its original responsibilities as defined herein.
13. Each PROJECT PARTNER certifies that it has disclosed to the other PROJECT PARTNER any known ongoing or anticipated litigation (to which it is a party) related to the PROJECT or PROJECT-affiliated flooding hazards, and shall continue to make such disclosures through the duration of this Agreement.
14. In the case of any dispute over any items in this Agreement, the PROJECT PARTNERS agree to use their best efforts and enter into good faith negotiations to resolve the disputed matters. However, this shall not limit the rights of the PROJECT PARTNERS to seek any remedies provided by law.
15. Each PROJECT PARTNER shall take reasonable and necessary actions within its authority to ensure that only storm water is discharged into the PROJECT, and that such discharges into the PROJECT comply at the point of discharge with any applicable requirements of the U.S. Environmental Protection Agency, Clean Water Act, Arizona Pollutant Discharge Elimination System or any other applicable discharge requirements, including any permit requirements.
16. The PROJECT PARTNERS agree to equally share the cost of a PROJECT compliance and cost audit to be initiated within sixty (60) days of PROJECT completion, if requested by either PROJECT PARTNER. An independent auditing firm on contract to the DISTRICT and agreeable to the PROJECT PARTNERS will perform the audit. Any payments or reimbursements necessary to bring the PROJECT into compliance with the audit findings shall be made within 45 days of acceptance by all PROJECT PARTNERS of the audit report.
17. Each PROJECT PARTNER (indemnitor) shall, to the extent permissible by law, indemnify, defend and save harmless the others (indemnitees) including agents, officers, directors, governors and employees thereof, from and against any loss or expense incurred as a result of any claim or suit of any nature whatsoever, which arises out of indemnitor's negligent or wrongful acts or omissions pursuant to this Agreement. The CITY shall further, to the extent permissible by law, indemnify, defend and save harmless the DISTRICT including agents, officers, directors, governors and employees thereof, from and against any loss or expense incurred as a result of any claim or suit of any nature whatsoever, which arises out of recreational use of the PROJECT in the event that it elects to invite such use (with or without DISTRICT concurrence). Such indemnification obligations shall encompass any personal injury, death or property damages resulting from the indemnitor's negligent or wrongful acts or omissions, as well as reasonable attorney fees, court costs, and other expenses relating to the defense against claims or litigation, incurred by the indemnitee. Indemnitee shall be liable for its own negligence or wrongful acts as provided by law.
18. Each PROJECT PARTNER
 - 18.1 Shall comply with A.R.S. §§ 41-4401 and 23-214(A). Failure by either PROJECT PARTNER to comply with A.R.S. §§ 41-4401 and 23-214(A) shall be deemed a breach of this Agreement and is subject to penalties up to and including termination of the Agreement.
 - 18.2 Retains the legal right to inspect the records of the other PROJECT PARTNER's and any contractors' or subcontractors' employees performing work under this Agreement to verify compliance with A.R.S. §§ 41-4401 and 23-214(A).

19. All notices or demands upon any PROJECT PARTNER shall be in writing and shall be delivered in person, by express delivery service for which a receipt is obtained or sent by mail addressed as follows:

Flood Control District of Maricopa County
Director
2801 West Durango Street
Phoenix, Arizona 85009-6399

City of Mesa
City Manager
P.O. Box 1466
Mesa, AZ 85211

20. This Agreement shall expire either (a) two years from the date of execution by all PROJECT PARTNERS, or (b) upon both completion of the PROJECT and satisfaction of all funding obligations and reimbursements associated with this Agreement, whichever is the first to occur. However, by mutual written agreement of all PROJECT PARTNERS, this Agreement may be amended or terminated except as expressly stated in this Agreement. The operation and maintenance and indemnification provisions of this Agreement shall survive the expiration of this Agreement.
21. This Agreement is subject to the provisions of A.R.S. § 38-511.
22. Attached to this Agreement or contained herein are the written determinations by the appropriate attorneys for the PROJECT PARTNERS, that these agencies are authorized under the laws of the State of Arizona to enter into this Agreement and that it is in proper form.
23. If legislation is enacted after the effective date of this Agreement that changes the relationship or structure of one or more PROJECT PARTNERS, the PROJECT PARTNERS agree that this Agreement shall be renegotiated at the written request of either PROJECT PARTNER.

FLOOD CONTROL DISTRICT OF MARICOPA COUNTY
A Political Subdivision of the State of Arizona

Recommended by:

Michael A. Fulton
Director

Date

Approved and Accepted:

By:

Chairman, Board of Directors Date

Attest:

By:

Clerk of the Board Date

The foregoing Intergovernmental Agreement FCD 2022A023 has been reviewed pursuant to A.R.S. Section 11-952, as amended, by the undersigned General Counsel, who has determined that it is in proper form and within the powers and authority granted to the Flood Control District of Maricopa County under the laws of the State of Arizona.

General Counsel

Date

CITY OF MESA
A Municipal Corporation

Approved and Accepted By:

City Manager

Date

Attest:

By:

City Clerk

Date

The foregoing Intergovernmental Agreement FCD 2022A023 has been reviewed pursuant to A.R.S. Section 11-952, as amended, by the undersigned attorney who has determined that it is in proper form and within the power and authority granted to the City of Mesa under the laws of the State of Arizona.

City Attorney

Date

Exhibit A: 2nd Avenue and Spencer Project

