

**SOUTH BROADWAY/MONTGOMERY WARD  
URBAN RENEWAL AREA**

**AMENDED AND RESTATED PROJECT FUNDING AGREEMENT FOR  
W. DAKOTA AVENUE STORM WATER OUTFALL AND STREET  
IMPROVEMENTS**

**AMONG  
CITY AND COUNTY OF DENVER, COLORADO,  
DENVER URBAN RENEWAL AUTHORITY  
AND  
BMP METROPOLITAN DISTRICT NO. 1**

**Dated as of \_\_\_\_\_, 2013**

THIS AMENDED AND RESTATED PROJECT FUNDING AGREEMENT FOR W. DAKOTA STORM WATER OUTFALL AND STREET IMPROVEMENTS PROJECT, dated as of the Effective Date (defined below) (this “Agreement”) is made by and among the CITY AND COUNTY OF DENVER, COLORADO (the “City”), a home-rule city and municipal corporation of the State of Colorado, the DENVER URBAN RENEWAL AUTHORITY (“DURA”), a body corporate duly organized and existing as an urban renewal authority under the laws of the State of Colorado, and BMP METROPOLITAN DISTRICT NO. 1 (“BMP”), a metropolitan district organized and existing under the Special District Act of the State of Colorado. This Agreement amends, restates and replaces the Project Funding Agreement for W. Dakota Storm Water Outfall and Street Improvements Project previously entered into by and among the City, DURA and BMP dated March 13, 2012 (the “Original Agreement”).

W I T N E S S E T H:

WHEREAS, DURA is a body corporate and has been duly created, organized, established and authorized to transact business and exercise its powers as an urban renewal authority within the City, all under and pursuant to the Colorado Urban Renewal Law, constituting Sections 31-25-101, *et seq.*, C.R.S., as amended (the “Act”); and

WHEREAS, BMP is a metropolitan district duly created, organized and established and authorized to transact business and exercise its powers as a special district within the City, all under and pursuant to the Colorado Special District Act, constituting Sections 32-1-101, *et seq.*, C.R.S., and the service plan of the district approved by the City pursuant to Ordinance No. 457, Series 2010 and filed with the Clerk of the City at Clerk Filing No. 10-846 (“Service Plan”).

WHEREAS, an urban renewal plan, known as the South Broadway/Montgomery Ward Urban Renewal Plan originally dated October, 1992, as amended February, 2012, has been duly and regularly approved by the City Council of the City in accordance with the Act, which Plan contemplates the construction of storm water and street improvements in and near the South Broadway/Montgomery Ward Urban Renewal Area (“Urban Renewal Area”), and

WHEREAS, the boundaries of BMP encompass the boundaries of the Urban Renewal Area, and BMP is authorized by its service plan to construct various public improvements, including storm water and street improvements both within and without the Urban Renewal Area; and

WHEREAS, the City and DURA have entered into the South Broadway/Montgomery Ward Urban Redevelopment Area Cooperation Agreement dated January 24, 2012 (the “Cooperation Agreement”) to finance additional storm water and street improvements in and near the Urban Renewal Area; and

WHEREAS, the City is willing to advance funds for certain costs related to the construction of the storm water and street improvements in and near the Urban Renewal Area, to be reimbursed in part by DURA from property tax increment revenues as provided in the Cooperation Agreement; and

WHEREAS, BMP agrees herein to undertake the Project as defined below in accordance with the provisions of this Agreement; and

WHEREAS, upon entering into this agreement, the Parties anticipate that the overall Project Costs will total approximately \$19,757,600 (the “Project Cost Estimate”), the initial \$16,800,000 in Project Costs to be borne by the City and DURA as described herein and the remaining Project Costs to be borne by BMP, as more fully set forth herein.

## A G R E E M E N T

NOW, THEREFORE, in consideration of the premises herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

### SECTION 1. DEFINITIONS

In addition to the defined terms set forth in the recitals or elsewhere in this agreement, the following terms shall have the following meanings:

“Certification of Project Costs” means the certification given by the City and DURA as evidence of approval of an Expenditure Certification submitted by BMP, the form of which is attached hereto as **Exhibit 2**.

“Dakota IGA” means that certain Intergovernmental Agreement between the City and BMP with respect to the Dakota Outfall and Dakota Avenue street improvements.

“Expenditure Certification” means the certificate of BMP, delivered to the City and DURA in the form attached hereto as **Exhibit 1**, and relating to Project Costs incurred by BMP for construction and delivery to the City of the Project.

“Project” means the W. Dakota Avenue Storm Water Outfall and Street Improvement Project, the purpose of which is to provide drainage improvements in accordance with City standards and requirements for the outfall area, including the South Broadway/Montgomery Ward Urban Renewal Area. The project involves the construction of a large box culvert along with upstream inlets and conduits generally commencing at the intersection of South Lincoln and Virginia Avenue, then running westerly along Virginia Avenue to South Broadway, northerly along South Broadway to Dakota Avenue, westerly along the West Dakota Avenue alignment through the South Broadway Montgomery Ward Urban Renewal Area to South Cherokee Street, continuing westerly through a bore or tunnel under the RTD and Consolidated Main Line tracks, across the former RTD bus barn property on South Santa Fe Drive, and connecting to the existing CDOT culvert under I-25 for ultimate drainage into the South Platte River. The route described above is subject to modification upon the mutual agreement of the City and BMP as may be necessary to address unknown conditions, provided that the alignment within the South Broadway Montgomery Ward Urban Renewal Area along the West Dakota Avenue alignment to South Cherokee Street shall not be modified in any material manner except as may be required by the City through its normal regulatory process. The Project shall also include, upon completion of the stormwater improvements through the Urban Renewal Area, improvements to West Dakota Avenue between South Broadway and South Cherokee Street sufficient to re-establish and dedicate West Dakota as a public street as well as streetscape improvements on South Cherokee Street, all in accordance with City standards and requirements; provided, however, that the West Dakota Avenue street improvements, as such term is used this Agreement, shall not include sidewalk and streetscape improvements along the northerly side of the street.

“Project Contract” means that certain Construction Management Agreement by and between BMP and PCL Construction Services, Inc., dated as of April 1, 2013.

“Project Costs” means the commercially reasonable costs and expenses actually incurred by BMP pursuant to the Project Contract; any design costs for the Project; any costs related to the acquisition of real property, easements, licenses or permits necessary for the construction of the Project; any change orders to the Project Contract as may be reflected on the Expenditure Certification from time-to-time; and any other documented and direct costs of the Project.

“TIF Termination Date” means October 31, 2017.

## **SECTION 2. CONSTRUCTION AND FUNDING OF THE PROJECT**

### **Section 2.1 Construction and delivery of the Project/Deferral of Fees.**

(a) BMP agrees to complete the design for and undertake the construction of the Project and to pursue the same with appropriate care and diligence, subject to the terms and provisions of Section 2.10 below and Force Majeure, as defined in Section 9.24 below. All construction by BMP with respect to the Project shall be undertaken and completed in accordance with all applicable laws and regulations, including but not limited to the South Broadway/Montgomery Ward Urban Renewal Plan, as it may be amended, the Dakota IGA, other related agreements and this Agreement. The City and DURA shall have no responsibility to undertake any construction with respect to the Project. Upon completion of the Project to the satisfaction of the City pursuant to the terms and conditions of the Dakota IGA and DURA pursuant to the terms and conditions of this Agreement, BMP shall convey Project improvements to the City, shall convey property for the extension of West Dakota Avenue from South Broadway to South Cherokee Street to the City and shall convey or assign to the City the District’s interests in any and all additional easements, license or permits necessary for the construction and maintenance of the storm water components of the Project westerly from S. Cherokee Street to the South Platte River, the City’s acceptance of the Project and the terms of such conveyances or assignments shall all be in accordance with the Dakota IGA.

(b) In consideration of BMP’s obligations hereunder, the City hereby agrees to defer payment of Sewer Use and Drainage Permit Inspection Fees and Street Occupancy Permit Fees until reimbursement is available pursuant to Section 2.5 below (collectively, the “Deferred Fees”).

### **Section 2.2 Eminent domain.**

In accordance with Section V(B)(4) of the BMP Service Plan, the City hereby authorizes BMP to condemn property or easements along the West Dakota Avenue corridor between South Broadway and South Cherokee Street as may be necessary for the construction of the Project. By virtue of the fact that this Agreement as a whole has been approved by the City Council, the Council shall be deemed to have authorized condemnation as required by the Service Plan. All other provisions of Section V(B)(4) of the Service Plan shall remain in full force and effect and shall govern any exercise of eminent domain by BMP.

### **Section 2.3 Consolidated main line railroad crossing.**

The City shall actively assist and cooperate with BMP, and use its good faith efforts to assist BMP in obtaining any and all necessary permits or licenses allowing the storm water outfall components of the Project to cross beneath the consolidated main line railroad tracks. Upon the request of BMP, the City shall act as a co-applicant with BMP on any application for such licenses or permits from the affected railroad companies or regulatory approval from government agency exercising authority over utility crossings of railroad facilities; provided, however, the ultimate responsibility for obtaining such licenses, permits or approval shall remain with BMP. Any and all costs associated with obtaining such licenses, permits or approval shall be included as a Project Cost and billed as provided in Section 2.4.

#### Section 2.4 Payment procedures for Project Costs.

All Project Costs shall be billed to the City as provided in this Section 2.4. In connection with all payments of Project Costs, BMP shall deliver to the City's Manager of Public Works and DURA an Expenditure Certification signed by an authorized representative of BMP, provided that such Expenditure Certifications shall be delivered no more frequently than once per month. The City shall promptly begin its review upon receipt of each Expenditure Certificate. DURA shall review each Expenditure Certification promptly upon receipt and notify BMP of any issues concerning the applicable Expenditure Certification or forward its approval to the City's Manager of Public Works if no concerning issues are identified within ten (10) business days of its receipt. The City shall have ten (10) business days after receipt of the approved Expenditure Certificate from DURA to finish its review and within such ten (10) day period shall either notify BMP of any issues concerning the applicable Expenditure Certification or approve such Expenditure Certificate, and make payment to BMP of the approved Expenditure Certificate amount. The City's and DURA's approval of any Expenditure Certification shall be made upon the form of Certification of Costs set forth in **Exhibit 2** of this Agreement ("Certification of Costs"). The obligation of the City to pay Project Costs shall be contingent upon receipt and approval by the City and DURA of such Expenditure Certifications. BMP covenants that all payments made to BMP hereunder shall be used solely for payment of Project Costs. BMP further agrees on a monthly basis to provide to the City's Manager of Finance an update on the status of the Project Costs Estimate and if the current budget to complete exceeds, is within or is below the Project Costs Estimate. The City's reimbursement obligations under this Section shall be limited to the amounts legally available for such purposes under this Agreement.

#### Section 2.5 Maximum City Liability, Maximum BMP Liability, Project Cost and Project Fund Reconciliation

- (a) (1) In order to pay Project Costs incurred under this Agreement, the City appropriated \$13 million (\$13,000,000.00) in its Capital Projects Fund, project accounting number 38302-5011102-PL20, via Ordinance No. 81, Series of 2012. That appropriation was reduced to \$12,489,768.95 on March 12, 2012, to reflect the previous expenditures authorized by DURA for study and design work associated with the Project pursuant to an Intergovernmental Agreement ("IGA") between the City and DURA dated May 16, 2011 (City Clerk File No. 11-327), part of the performance of which was assigned to BMP via a Memorandum of Understanding (the "MOU") dated August 8, 2011 and amended November 22, 2011 (the "Existing Appropriation"). This sum shall be deemed a continuing capital appropriation from year-to-year within the meaning of Denver Charter section 7.2.3, and the City hereby irrevocably pledges this

appropriation for future-year payments of Project Costs under this Agreement within the meaning of Article X, Section 20 (4)(b) of the Colorado Constitution.

(2) In addition to the Existing Appropriation, the City's Manager of Finance agrees concurrently with the request for City Council to approve this Agreement, to also request City Council appropriate an additional \$3,800,000 (the "Additional Funding") for a total maximum amount of \$16,800,000 (the "Maximum City Liability") to be utilized for the Project Costs. A portion of the Additional Funding will be a request for an appropriation of \$2,500,000 from the City's Waste Water Enterprise Fund (the "Waste Water Funds") and the remaining \$1,300,000 will be a request for appropriation from the City's Capital Improvements Fund ("CIF Funds").

- (b) As of April 18, 2013, \$1,602,741.57 of the Maximum City Liability has been expended on expenditures previously authorized by DURA for study and design work associated with the Project pursuant to the IGA and MOU
- (c) All Project Costs in excess of the Maximum City Liability associated with completion and delivery of the Project shall be the responsibility of BMP ("BMP Funds"), except as set forth below. As of May 1, 2013, BMP's share of Project Costs is a minimum of \$2,957,600 ("BMP Share").
- (d) It is understood and agreed that as Project Costs, if eligible for reimbursement hereunder, are incurred, such Project Costs shall be paid as follows: (i) first from the Existing Appropriation and the Additional Funding; (ii) second, from the BMP Share; and (iii) other BMP funds.
- (e) Upon the completion of the Project and the City's acceptance of conveyance of the Project pursuant to the Dakota IGA (such date being referred to herein as "Project Completion"), the parties shall determine the actual total Project Costs. In the event the actual total Project Costs are less than the Project Cost Estimate, then any savings shall be applied as follows: (i) first to the payment of Deferred Fees; (ii) second to repay the City for expenditures of the Additional Funding; and (iii) if the savings exceed the total of both the Additional Funding and the Deferred Fees then prorata between the BMP Share and the City's Existing Appropriation. In addition, BMP shall pay any amount of the BMP Share not spent on Project Costs to the City.
- (f) Upon the TIF Termination Date, the parties shall complete a reconciliation of all Project Costs and the use of the Project Funds. The reconciliation shall determine (i) how much of the Project Costs remain outstanding and not yet due; (ii) the amount of Deferred Fees; and (iii) how much of the Project Costs were paid using the Existing Appropriation, the Additional Funding and BMP Funding. In addition, at the TIF Termination Date, a determination shall be made by DURA, in conjunction with the City of how much revenue was collected from the incremental property tax. In addition a determination shall be made by the City as to the net sales taxes collected within the Broadway Marketplace Urban Renewal Area (collectively the collected

incremental property tax and the net sales taxes collected are “Area Revenue”).

- (g) If, as of the TIF Termination Date, the Area Revenue is in excess of the Existing Appropriation (the “Excess Area Revenue”), such Excess Area Revenue shall be applied as follows: (i) first, to Deferred Fees; and (ii) second, to reimburse BMP for any Project Costs incurred that caused BMP’s actual expenditures to exceed the BMP Share. Any Excess Area Revenue remaining after payment of (i) and (ii) above shall be remitted as follows: (I) the incremental property taxes to DURA for distribution pursuant to the Cooperation Agreement and (II) the net sales taxes to the City.

Section 2.6. Reimbursement by DURA to the City for Project Costs/Waste Water Funds Reimbursement.

(a) As more fully set forth in the Cooperation Agreement, DURA shall reimburse the City from property tax increment revenues derived from the Urban Renewal Area for payments made by the City to BMP for a portion of the Project Costs, excluding any Deferred Fees, incurred by the City under this Agreement up to, but not exceeding the Existing Appropriation amount, excluding the following: (i) any costs associated with the acquisition of land for the Project within the Urban Renewal Area; (ii) any costs associated with the demolition of any existing commercial building within the Urban Renewal Area; or (iii) any costs associated with the relocation of any tenants presently located in any commercial building within the Urban Renewal Area. DURA shall authorize such reimbursement concurrently with approving any Expenditure Certification under Section 2.4 utilizing the Certification of Costs form set forth in **Exhibit 2** of this Agreement. DURA’s reimbursement obligations under this Section shall be limited to the amounts legally available for such purposes under the Cooperation Agreement. DURA’s obligation to reimburse the City shall cease no later than the TIF Termination Date regardless of whether or not all Project Costs have been paid or all City payments to BMP under Section 3.4 have been reimbursed as of that date.

(b) Notwithstanding anything to the contrary contained herein, the Waste Water Funds may not be used for the following: (i) any costs associated with the acquisition of land or buildings for the Project; (ii) any cost associated with the demolition of any existing commercial building necessary for the project; (iii) any costs associated with the relocation of any tenants presently located in any commercial building within the Project, including construction of new building space for relocated tenants; (iv) legal costs or expenses; or (v) Enhanced Training Opportunities expenses.

Section 2.7 Access by the City and DURA.

BMP hereby grants to the City and DURA authority to enter any location where the Project is being constructed for the purpose of carrying out or determining compliance with the South Broadway/Montgomery Ward Urban Renewal Plan, this Agreement, the Dakota IGA, any other agreements related to the Project or any City code or ordinance, including, without limitation, inspection of any work being conducted with respect to the Project; provided that, except in the event of an emergency, the City or DURA shall provide reasonable advance notice to BMP of their intention to so inspect. Nothing herein shall limit the City’s exercise of its police power.

Section 2.8 Compliance with certain DURA contracting policies

- (a) *Project Art.* As provided in the Cooperation Agreement, DURA shall reserve from the tax increment revenues derived from the Urban Renewal Area the sum of \$130,000 for the purpose of purchasing and installing project art in the Urban Renewal Area. DURA shall cooperate with BMP in the selection and installation of project art after the completion and delivery of the Project in accordance with DURA’s Project Art Policy, a copy of which is attached hereto as **Exhibit 3**. Compliance with DURA’s Project Art Policy shall be deemed to be in lieu of any obligation on the part of BMP to comply with the City’s Public Art Ordinance (Sections 20-85, *et seq.*, D.R.M.C.) in the construction of the Project.
- (b) *Enhanced Training Opportunities.* BMP agrees that, with respect to the Project, it shall comply with DURA’s Policy Regarding Enhanced Training Opportunities for Projects Funded with Tax Increment Financing (“ETO Policy”), a copy of which is attached as **Exhibit 4**. DURA and BMP agree that the amount of funding that must be provided for enhanced training opportunities under the policy in connection with the Project is \$130,000.
- (c) *First Source Program.* BMP shall cooperate with DURA for the period of construction of the Project and, in connection with DURA or a government office or agency designated by DURA (the “Agency”), participate in a program to provide preferential opportunities for employment and training of low-income Denver residents (the “First Source Program”) more fully described in **Exhibit 5**. BMP shall designate a job placement **coordinator who shall be** responsible for implementing the First Source Program and coordinating with DURA and the Agency regarding BMP’s efforts in connection therewith. To the extent not paid by the Agency, the costs of the First Source Program shall be shared equally between DURA and BMP. In the event that BMP believes that the First Source Program as structured in **Exhibit 5** substantially interferes with BMP’s business operations, DURA agrees to consider in good faith any reasonable modifications to ameliorate such substantial interference.
- (d) *Relocation Assistance Policy.* Notwithstanding the fact that DURA shall not be required to pay or reimbursed the City or BMP for any tenant relocation costs as provided in Section 2.6, BMP shall comply with DURA’s Relocation Assistance Policy, a copy of which is attached hereto as **Exhibit 6**, to the extent the construction of the Project results in the displacement of any existing business.

Section 2.9 Compliance with certain City contracting policies.

In accordance with Section V(C) of the BMP Service Plan and as more fully set forth in the ordinances of the City, in contracting for the construction of the Project, BMP shall comply with the following City contracting requirements:

- (a) Payment of prevailing wages.
- (b) Participation of small or disadvantaged businesses.
- (c) Non-discrimination in employment.



Section 2.10 Project Commencement and Project Completion.

(a) BMP shall commence construction of the Project (the “Project Commencement Date”) on or before August 31, 2013, and shall complete the construction of the Project to the satisfaction of the City, as determined by the Dakota IGA and DURA, pursuant to the terms of this Agreement, and shall deliver the Project to the City no later than thirty-six (36) months after the Project Commencement Date as the same may be extended hereunder (the “Project Completion Date”). Notwithstanding the foregoing, in the event BMP encounters unknown environmental conditions that materially impact the Estimated Project Costs or the schedule for completion of the Project, BMP shall be entitled, following written approval by the City’s Manager of Public Works, Manager of Finance and DURA, to extend the Project Completion Date for a period not to exceed thirty (30) months. In addition, extensions to the Project Completion Deadline may be granted for other reasons, upon the written consent of DURA and the City’s Manager of Public Works. In no event, however, shall BMP’s right to extend the Project Completion Date as provided herein be deemed to excuse BMP from completing the Project. Such obligation to complete the Project shall remain and shall not be terminated by BMP until Project Completion.

(b) Upon the Project Completion Date, BMP shall also submit to DURA and the City a written certificate stating that no further payments or reimbursements of Project Costs shall be requested by BMP pursuant to the terms hereof (a “Funding Completion Certificate”).

**SECTION 3. REPRESENTATIONS AND WARRANTIES OF BMP**

Section 3.1 Representations and warranties.

BMP represents and warrants that:

- (a) BMP is a legal entity established under the Colorado Special Districts Act of the State of Colorado. BMP validly exists, the execution and delivery of this Agreement is not a violation of the Special Districts Act, the Service Plan or BMP’s bylaws, and BMP has the power and the legal right to enter into this Agreement and has duly authorized the execution, delivery and performance of this Agreement by proper action.
- (b) The consummation of the transactions contemplated by this Agreement will not violate any provisions of the governing documents of BMP or constitute a default or result in the breach of any term or provision of any contract or agreement to which BMP is a party or by which it is bound.
- (c) BMP will cooperate with DURA with respect to any litigation brought by a third party concerning the South Broadway/Montgomery Ward Urban Renewal Plan, the Project, or this Agreement.
- (d) The construction of the Project and the contemplated uses and occupancy thereof, shall comply with all applicable federal, state and City laws, rules and regulations, including, but not limited to, building, zoning, and other applicable land use codes,

subject to modifications approved by the City pursuant to the planning, subdivision, zoning environmental and other development ordinances and regulations.

#### **SECTION 4. GENERAL COVENANTS**

##### **Section 4.1 Insurance.**

(a) Within ten (10) days after the satisfaction of the contingency set forth in Section 2.11 hereof and until completion of construction, BMP shall provide the City and DURA with certificates of insurance as follows:

(i) Commercial general liability insurance with XC&U exclusions deleted (including completed operations, operations of subcontractors, blanket contractual liability insurance, owned, non-owned and hired motor vehicle liability, personal injury liability) with limits against bodily injury and property damage of not less than \$5,000,000 for any person and \$5,000,000 for any occurrence; and

(ii) Worker's compensation insurance, with statutory coverage.

(b) The policies of insurance required under subsection (a) above, shall be reasonably satisfactory to the City and DURA, shall, for commercial general liability, list the City and DURA as additional insureds, shall be placed with financially sound and reputable insurers licensed to transact business in the State of Colorado, and shall require the insurer to give at least thirty (30) days' advance written notice to the City and DURA prior to cancellation or change in coverage. BMP shall provide certified copies of all policies of insurance required under subsection (a) above, to DURA and the City upon request. For all insurance required to be carried by BMP under this Section 4.1, BMP shall require its insurer(s) to provide the City and DURA and their respective commissioners, directors, officers, employees and agents with waivers of subrogation. BMP shall not obtain any insurance that prohibits the insured from waiving subrogation. To the extent available in the insurance industry at a commercially reasonable price, all policies required to be obtained by BMP shall be written as "occurrence" policies and not as "claims-made" policies.

(c) In agreeing to the foregoing insurance requirements, neither the City, DURA nor BMP intend to waive any provision of the Colorado Governmental Immunity Act, §§ 24-10-101, *et seq.*, C.R.S.

##### **Section 4.2 Cooperation.**

The parties agree to execute such additional documents, including any estoppel certificates and take any such actions as may be reasonably requested by the other parties in order to fulfill the purposes of this Agreement.

#### **SECTION 5. INDEMNITY**

Section 5.1 General Indemnity.

To the extent permitted by law, and without intending to waive applicable governmental immunity, BMP covenants and agrees, at its expense, to release, pay, indemnify, and defend and hold harmless, DURA, and its board of commissioners, officers, agents, employees, engineers and attorneys and the City and its City Council, officers, agents, employees, engineers and attorneys (collectively, “Indemnified Parties” or singularly, each an “Indemnified Party”) of, from and against, any and all claims, damages, demands, expenses (including reasonable attorneys’ fees and court costs), and liabilities resulting directly or indirectly from BMP’s development, construction, repair, maintenance, management, and any other conduct or activities with respect to the Project unless such claims, damages, demands, expenses, or liabilities, arise solely by reason of the negligent act or omission of DURA, the City or other Indemnified Party.

Section 5.2 Environmental Indemnity.

To the extent permitted by law, and without intending to waive applicable governmental immunity, BMP hereby agrees to indemnify, defend and hold harmless the Indemnified Parties from and against any and all Environmental Liabilities, whenever and by whomever asserted.

As used in this Section, “Environmental Liabilities” shall mean any obligations or liabilities (including, without limitation, any claims, demands, actions, suits, enforcement actions, judgments, orders, writs, decrees, permits or injunctions imposed by any court, administrative agency, tribunal or otherwise, or other assertions of obligations and liabilities) that are:

(a) related to protection of the environment or human health or safety and involving the Project or the Urban Renewal Area (including, but not limited to, on-site or off-site contamination by pollutants, whether known or unknown, and occupational safety and health); and

(b) involving the Project or the Urban Renewal Area and arising out of, based upon or related to (x) environmental protection laws, or (y) any judgment, order, writ, decree, permit or injunction imposed by any court, administrative agency, tribunal or otherwise.

The term “Environmental Liabilities” shall include, but not be limited to: (i) fines, penalties, judgments, awards, settlements, losses, damages (including foreseeable and unforeseeable consequential damages), costs, fees (including attorneys’ and consultants’ fees), expenses and disbursements; (ii) defense and other responses to any administrative or judicial action (including claims, notice letters, complaints, and other assertions of liability); and (iii) financial responsibility for (x) cleanup costs and injunctive relief, including any corrective action, removal, remedial or other response actions, and natural resources damages, (y) any other compliance or remedial measures, and (z) bodily injury, medical monitoring, wrongful death, and property damage.

The terms “removal,” “remedial” and “response” action shall include, without limitation, the types of activities covered by CERCLA, as amended, and whether the activities are those which might be taken by a government entity or those which a government entity might seek to require

of waste generators, storers, treaters, owners, operators, transporters, disposers or other persons under “removal,” “remedial,” or other “response” actions.

**Section 5.3    Indemnification Procedures.**

(a)    If any claim relating to the matters indemnified against pursuant to this Agreement is asserted against an Indemnified Party that may result in any damage for which any Indemnified Party is entitled to indemnification under this Agreement, then the Indemnified Party shall promptly give notice of such claim to BMP.

(b)    Upon receipt of such notice, BMP shall have the right to undertake, by counsel or representatives of its own choosing, the good faith defense, compromise or settlement of the claim, such defense, compromise or settlement to be undertaken on behalf of the Indemnified Party.

(c)    The Indemnified Party shall cooperate with BMP in such defense at BMP’s expense and provide BMP with all information and assistance reasonably necessary to permit such party or parties to settle and/or defend any such claim.

(d)    The Indemnified Party may, but shall not be obligated to, participate at its own expense in a defense of the claim by counsel of its own choosing, but BMP shall be entitled to control the defense unless the Indemnified Party has relieved BMP from liability with respect to the particular matter.

(e)    If BMP elects to undertake such defense by its own counsel or representatives, BMP shall give notice of such election to the Indemnified Party within ten (10) days after receiving notice of the claim from the Indemnified Party.

(f)    If BMP does not so elect or fails to act within such period of ten (10) days, the Indemnified Party may, but shall not be obligated to, undertake the sole defense thereof by counsel or other representatives designated by it, such defense to be at the expense of BMP.

(g)    The assumption of such sole defense by the Indemnified Party shall in no way affect the indemnification obligations of BMP; provided, that no settlement of any claim shall be effected without BMP’s consent.

**SECTION 6.            EVENTS OF DEFAULT; REMEDIES**

**Section 6.1    Event of Default by BMP.**

A Default by BMP under this Agreement shall mean one or more of the following events:

(a)    BMP transfers or assigns its interest in this Agreement, without the consent of the City’s Manager of Public Work and Manager of Finance and DURA;

(b)    BMP commences a voluntary case under any applicable federal or state bankruptcy, insolvency or other similar law now or hereafter in effect, or is the subject of an involuntary case of such nature not dismissed within sixty (60) days after it is filed, or consents

to the appointment of or taking possession by a receiver, liquidator, assignee, custodian, trustee or sequestrator (or other similar official) of BMP or of any substantial part of its property, or BMP makes any general assignment for the benefit of creditors or generally fails to pay its debts as they become due or takes any action in furtherance of such action;

- (c) BMP fails to comply with the requirements of Section 5 hereof;
- (d) BMP fails to use best efforts to comply with the DURA's First Source Program or ETO Policy or the City's Prevailing Wage requirements.
- (e) BMP fails to spend amounts received pursuant to Section 2.4 on the Project; or
- (f) BMP fails to complete and deliver the Project by the date prescribed in Section 2.10;

and if such Defaults are not cured by BMP within the time provided in Section 6.5, then an Event of Default shall have occurred and each of DURA and the City may exercise any remedy available under this Agreement.

#### Section 6.2 Events of Default by DURA.

Default by DURA under this Agreement shall be limited solely to the failure of DURA to reimburse the City for payment of Project Costs as provided in Section 2.6. If such Default is not cured within the time provided in Section 6.5, then an Event of Default shall be deemed to have occurred, and the City may exercise the remedy available under Section 6.4 of this Agreement.

#### Section 6.3 Events of Default by the City.

Default by the City under this Agreement shall be limited solely to the failure of the City to make payments to BMP for Project Costs as provided in Section 2.4. If such Default is not cured within the time provided in Section 6.5, then an Event of Default shall be deemed to have occurred, and BMP may exercise the remedy available under Section 6.4 of this Agreement.

#### Section 6.4 Remedies.

If any Event of Default by BMP occurs and is continuing hereunder, DURA or the City may (i) seek any available remedy at law; (ii) seek enforcement of BMP's obligations hereunder by any equitable remedies, such as specific performance or injunction; (iii) cure such Event of Default, for which BMP agrees to indemnify DURA and the City in accordance with the procedures set forth in Section 5.1; or (iv) with respect to Project Costs, if the Event of Default is due to BMP's failure to spend amounts received pursuant to Section 2.4 on the Project or if BMP fails to complete and deliver the Project by the Project Completion Date, the City may withhold payment of such Project Costs. If any Event of Default by DURA occurs and is continuing hereunder, the City may seek enforcement of DURA's reimbursement obligation under Section 2.6 through specific performance. If an Event of Default by the City occurs and is continuing hereunder, BMP may seek enforcement of the City's obligations under Section 2.4 through

specific performance. If payment to BMP of Project Costs are not made by reason of the City's failure to pay BMP for project costs as provided in Section 2.4, BMP shall have the right to terminate work on Project until such payment failure is remedied, and, if such payment is not made within ten (10) days of receipt by the City and DURA of notice from BMP of the failure by BMP to receive such payment, BMP may terminate the Project.

In no event shall BMP, DURA or the City be liable to the other parties hereto for damages, including special, consequential or punitive damages, and each party hereby waives any claims or actions for damages against the other parties hereto.

**Section 6.5**     Notice of Defaults; Opportunity to Cure Such Defaults.

Anything hereunder to the contrary notwithstanding, no Default under Section 6.1, 6.2 or 6.3 hereof shall constitute an Event of Default until (a) actual notice of such Default shall be given to the party in Default by one of the other parties hereto, (b) and the party in Default shall have had thirty (30) days after receipt of such notice to correct said Default or cause said Default to be corrected and shall not have corrected said Default or caused said Default to be corrected within the applicable period; (c) provided, however, if said Default be such that it cannot be corrected within the applicable period, it shall not constitute an Event of Default if corrective action is instituted within the applicable period and diligently pursued until the Default is corrected; so long as that corrective action is completed no later than ninety (90) days after receipt of notice; and d) if the actual notice of Default is given by BMP to the City due to failure by the City to deliver funds to BMP as required pursuant to Section 2.4, the Default under Section 6.3 shall constitute an Event of Default if the City has not delivered funds to BMP within [five (5)] business days of receipt of the actual notice of Default.

**SECTION 7.           TERMINATION**

**Section 7.1**     Scheduled termination.

This Agreement shall continue throughout the design and construction of the Project through the Project Completion Date, and thereafter this Agreement shall automatically terminate, except as provided in Section 9.17, and each party shall execute such documents to evidence such termination as may be reasonably required by any of the parties.

**SECTION 8.           RESTRICTIONS ON ASSIGNMENT AND TRANSFER**

**Section 8.1**     Limitation on Assignment and Pledge.

BMP shall not assign or pledge its rights or duties and obligations pursuant to this Agreement without the prior written consent of DURA and the City's Manager of Public Works and Manager of Finance, and any purported assignment without consent of DURA and the City shall be null and void.

## **SECTION 9. MISCELLANEOUS**

### Section 9.1 Limitation of Rights.

With the exception of rights herein expressly conferred, nothing expressed or to be implied by this Agreement is intended or shall be construed to give to any person other than the parties hereto any legal or equitable right, remedy or claim under or in respect to this Agreement or any covenants, conditions and provisions hereof.

### Section 9.2 Notices.

All notices, certificates or other communications hereunder shall be sufficiently given and shall be deemed given when given by hand delivery, overnight delivery, mailed by certified or registered mail, postage prepaid, or dispatched by telegram or telecopy (if confirmed promptly telephonically), addressed to the following persons and addresses or at such other address or addresses as any party hereto shall designate in writing to the other parties hereto:

#### **TO DURA:**

Denver Urban Renewal Authority  
1555 California Street  
Suite 200  
Denver, Colorado 80202  
Attention: Executive Director

#### **TO THE CITY:**

Manager of Finance  
Webb Municipal Office Building  
201 W. Colfax Ave., Dept. 1010  
Denver, CO 80202

Manager of Public Works  
Webb Municipal Office Building  
201 W. Colfax Ave, Dept 608  
Denver, CO 80202

City Attorney  
Denver City and County Building  
1435 Bannock St., Room 353  
Denver, CO 80202

#### **TO BMP:**

District President:

Dan Cohen, President

BMP Metropolitan Districts  
595 S. Broadway, Suite 200  
Denver, CO 80203

District Counsel:

MaryAnn M. McGeady  
McGeady Sisneros, P.C.  
450 E. 17<sup>th</sup> Ave.  
Denver, CO 80203

Section 9.3 Waiver.

No failure by any party hereto to insist upon the strict performance of any covenant, duty, agreement or condition of this Agreement, or to exercise any right or remedy consequent upon a breach of this Agreement, shall constitute a waiver of any such breach or of such or any other covenant, agreement, term or condition. Any party, by giving notice to the other parties may, but shall not be required to, waive any of its rights or any conditions to any of its obligations hereunder. No waiver shall affect or alter the remainder of this Agreement, but each and every covenant, agreement, term and condition of this Agreement shall continue in full force and effect with respect to any other then existing or subsequent breach.

Section 9.4 Attorneys' Fees.

In any proceeding brought to enforce the provisions of this Agreement, each party shall be responsible for its own attorneys' fees, actual court costs and other expenses incurred.

Section 9.5 Conflicts of Interest.

DURA and the City shall not allow, and except as disclosed in writing to DURA and the City, BMP shall not knowingly permit, any of the following persons to have any interest, direct or indirect, in this Agreement: A member of the governing body of DURA or of the City or an employee of DURA or of the City who exercises responsibility concerning the Project. DURA and the City shall not allow and BMP shall not knowingly permit any of the above persons or entities to participate in any decision relating to this Agreement that affects his or her personal interest or the interest of any corporation, partnership or association in which he or she is directly or indirectly interested.

Section 9.6 Titles of Sections.

Any titles of the several parts and Sections of this Agreement are inserted for convenience of reference only and shall be disregarded in construing or interpreting any of its provisions.

Section 9.7 Not Partners; BMP Not Agent of DURA or City.

Notwithstanding any language in this Agreement or any other agreement, representation or warranty to the contrary, neither DURA nor the City shall be deemed or constituted a partner or



joint venturer of BMP, BMP shall not be the agent of DURA or the City, and neither DURA nor the City shall be responsible for any debt or liability of BMP.

Section 9.8 Applicable Law.

The internal laws of the State of Colorado, the City Charter and the Denver Revised Municipal Code shall govern the interpretation and enforcement of this Agreement, without giving effect to choice of law principles.

Section 9.9 Binding Effect.

This Agreement shall be binding on and inure to the benefit of the parties hereto, and their successors and assigns, subject to the limitations on assignability of this Agreement by BMP as set forth in Section 8.1.

Section 9.10 Further Assurances.

The parties hereto agree to execute such documents, and take such action, as shall be reasonably requested by the other parties hereto to confirm or clarify the intent of the provisions hereof and to effectuate the agreements herein contained and the intent hereof.

Section 9.11 Time of Essence.

Time is of the essence of this Agreement. The parties will make every reasonable effort to expedite the subject matters hereof and acknowledge that the successful performance of this Agreement requires their continued cooperation.

Section 9.12 Severability.

If any provision, covenant, agreement or portion of this Agreement, or its application to any person, entity or property, is held invalid, such invalidity shall not affect the application or validity of any other provisions, covenants or portions of this Agreement and, to that end, any provisions, covenants, agreements or portions of this Agreement are declared to be severable.

Section 9.13 Good Faith; Consent or Approval.

Except as specifically set forth herein to the contrary, in performance of this Agreement, the parties agree that each will act in good faith and will not act unreasonably, arbitrarily, capriciously or unreasonably withhold or delay any approval required by this Agreement. Except as otherwise provided in this Agreement, whenever consent or approval of a party is required, such consent or approval shall not be unreasonably withheld, conditioned or delayed. BMP agrees and acknowledges that in each instance in this Agreement or elsewhere where DURA or the City is required or has the right to review or give its approval or consent, no such review, approval or consent shall imply or be deemed to constitute an opinion by DURA or the City, nor impose upon DURA or the City, any responsibility for the design or construction of the Project, including but not limited to the structural integrity or life/safety requirements or adequacy of budgets or financing or compliance with any applicable federal or state law, or local ordinance or regulation, including the Environmental Laws. All reviews, approval and consents by DURA or

the City under the terms of this Agreement are for the sole and exclusive benefit BMP and no other person or party shall have the right to rely thereon. Notwithstanding anything in the Agreement to the contrary, nothing herein shall limit or impair the City's police powers, including its regulatory powers.

Section 9.14 Counterparts.

This Agreement may be executed in several counterparts, each of which shall be an original and all of which shall constitute but one and the same instrument.

Section 9.15 Nonliability of DURA, BMP or City Officials and Employees.

No council member, commissioner, board member, official, officer, employee, agent or consultant of DURA, BMP or the City shall be personally liable in the event of a breach or Event of Default by DURA, BMP or the City or for any amount that may become due under the terms of this Agreement.

Section 9.16 Incorporation of Exhibits.

All exhibits attached to this Agreement are incorporated into and made a part of this Agreement.

Section 9.17 Survival.

The indemnity obligations of BMP under Section 5 shall survive any termination of this Agreement until the latest expiry of all applicable statutes of limitation.

Section 9.18 Subsequent Events.

If at any time during the term of this Agreement BMP requests the cooperation of DURA or the City in connection with an assignment or any other action under this Agreement, BMP expressly assumes the obligation to pay any and all fees and expenses, including reasonable consultants' fees, attorneys' fees, incurred by DURA and the City in connection with such action or assignment.

Section 9.19 No Third Party Beneficiaries.

The City, BMP and DURA intend that this Agreement shall create no third party beneficiary interests. The City, BMP and DURA are not presently aware of any actions by them or any of their authorized representatives which would form the basis for interpretation constituting a different interest, and, in any event, expressly disclaim any such acts or actions.

Section 9.20 Right to Inspect Books.

In addition to all rights the City has under C.R.S. 24-72-201, BMP and DURA agree that the City, the City's Auditor and any authorized representative of the City shall have the right, at all reasonable times and after reasonable notice, to examine all books and records with respect to this Agreement.

Section 9.21 Modification.

This Agreement may be modified, amended, changed or terminated, in whole or in part, without City Council approval unless City Council approval is required by City Charter. Any modification, amendment, change or termination shall be in writing executed by the City, BMP and DURA.

Section 9.22 Venue.

Venue shall be exclusively to the District Court in and for the City and County of Denver.

Section 9.23 Nondiscrimination.

In connection with the performance of work under this Agreement, the City, BMP and DURA agree not to refuse to hire, discharge, promote or demote, or to discriminate in matters of compensation against any person otherwise qualified, solely because of race, color, religion, national origin, gender, age, military status, sexual orientation, marital status or physical and mental disability; and the City, BMP and DURA further agree to insert the foregoing provision in all subcontracts hereunder.

Section 9.24 Force Majeure

(a) “Force Majeure” shall mean any event arising from causes beyond the control of BMP that delays the performance of any obligation under this Agreement despite BMP’s best efforts to fulfill the obligation, limited to: (i) acts of God; (ii) war; (iii) terrorist attacks; (iv) prolonged strikes; (v) flooding; and (vi) vandalism.

(b) In the event that a delay or anticipated delay in performance is anticipated delay is attributable to a Force Majeure event, the time for performance of the obligations under this Agreement that are affected by the Force Majeure event will be extended for such reasonable time as is necessary to complete those obligations. In the event that the Force Majeure event is of a nature that makes the completion of the Project physically impossible or commercially unreasonable, BMP shall have no further obligation to complete the Project but shall make the conveyances to the City contemplated in Section 2.1 above of the portions of the Project that were completed prior to the Force Majeure event.

Section 9.25 Effective Date and Term. The Effective Date of this Agreement shall be the date set forth on the City signature page below. This Agreement shall automatically terminate upon completion of all obligations hereunder.

Section 9.26 Counterparts, Electronic Signatures and Electronic Records. This Agreement may be executed in counterparts, each of which shall be deemed to be an original, but all of which shall together constitute one and the same document. Facsimile signatures shall be accepted as originals. The parties consent to the use of electronic signatures by the City. The Agreement and any other documents requiring a signature may be signed electronically by the

City in the manner specified by the City. The parties agree not to deny the legal effect or enforceability of this Agreement solely because it is in electronic form or because an electronic record was used in its formation. The parties agree not to object to the admissibility of this Agreement in the form of an electronic record, a paper copy of an electronic document, or a paper copy of a document bearing an electronic signature, on the grounds that it is an electronic record or an electronic signature or that it is not in its original form or is not an original.

Section 9.27 2012 Project Funding Agreement Superseded. Upon execution of this Agreement, the South Broadway/Montgomery Ward Urban Renewal Area Project Funding Agreement for West Dakota Avenue Storm Water Outfall and Street Improvements among the City, DURA and BMP dated March 13, 2012 shall be deemed terminated and superseded by this Agreement.

[SIGNATURE PAGE FOLLOWS]

IN WITNESS WHEREOF, the parties have caused this Agreement to be duly executed and delivered by their respective officers, as of:\_\_\_\_\_.

CITY AND COUNTY OF DENVER

By: \_\_\_\_\_  
Mayor

ATTEST:

By: \_\_\_\_\_  
Debra Johnson, Clerk and Recorder, *Ex-Officio* Clerk of the City and County of Denver

**APPROVED AS TO FORM:**

Douglas J. Friednash, Attorney for the City and County of Denver

**REGISTERED AND COUNTERSIGNED:**

By: \_\_\_\_\_  
Assistant City Attorney

By: \_\_\_\_\_  
Manager of Finance

By: \_\_\_\_\_  
Auditor

DENVER URBAN RENEWAL AUTHORITY

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

ATTEST:

By: \_\_\_\_\_

BMP METROPOLITAN DISTRICT NO. 1

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

ATTEST:

By: \_\_\_\_\_