


## MEMORANDUM

To: Ketchum Urban Renewal Agency Board members and Suzanne Frick

From: RPA Agency counsel 

Date: November 10, 2021

Re: Planning, Design, Engineering Construction Project Agreement

On your agenda for the November 15, 2021, Board meeting, you will be discussing the above referenced agreement (“Agreement”). In simplest terms, the Agreement defines the services the city of Ketchum will provide for the planning, design, engineering, and construction project activity related to the KURA sidewalk improvement project, which the Agency has identified to design and engineer the project with construction of the improvements in the 2022 construction season. KURA will provide a not-to-exceed amount to pay the City for all these services and the construction contract to install the improvements. We have found this type of agreement a good model for urban renewal agencies which do not have an administrative infrastructure to take on all the responsibilities of the statutory process for selection of architects, engineers, contractors, or construction managers. Especially in situations where the funded urban renewal project is a very traditional project typically developed and constructed by a city or other related public entity, the city or other related public entity takes on the responsibility of those services with the urban renewal agency providing all or part of the funding for the project.

This draft agreement is subject to your input and guidance to further refine and define the project and the responsibilities of KURA and the City. Several highlights and open issues for comment:

- The overall project to be funded by KURA is defined as the Sidewalk Related Improvements/Sidewalk Improvements Project. You likely have a much better reference which we can use, as well as probably attaching a map or other exhibit which would better describe the project. The Agreement does indicate the improvements KURA intends to fund is part of a larger project the City is moving forward with concerning similar improvements outside the KURA Project Area.
- The Agreement recognizes the City, either through its own internal staff or by formal selection of the architect/engineer, has started the process of design and engineering for the Sidewalk Improvements Project.
- As I understand the status of the Sidewalk Improvements Project, the design and engineering, at least at the conceptual level, has been reviewed and approved by KURA and the City.
- At this point, there should be the ability to provide a reasonable not-to-exceed figure which KURA will agree to fund for the Sidewalk Related Improvements. This amount should also include an estimate of the expenses incurred by the City for internal activity by City staff. Once that estimate is

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provided, KURA will have the option to move forward with the Sidewalk Related Improvements or decide to modify the project to meet budgetary constraints.

- As drafted, the KURA contribution is on a reimbursable basis paid when the City provides appropriate invoicing for design and engineering and after selection invoicing from the contractor.
- When the contractor bids are received, KURA and the City have another point where they may need to decide whether to move forward as originally planned or respond to the bid amount if it exceeds the not-to-exceed amount previously agreed to by KURA.
- This draft does provide for a monetary contribution of some amount by the City as part of its contribution to the Sidewalk Related Improvements. Alternatively, the City could contribute to the project by not charging KURA for the City's internal costs of its staff to manage this project.

Certainly, there may be other issues or concerns which we can address at the Board meeting.

**PLANNING, DESIGN, ENGINEERING, AND  
CONSTRUCTION PROJECT AGREEMENT  
DOWNTOWN KETCHUM IMPROVEMENT PROJECT  
(SIDEWALK RELATED IMPROVEMENTS)**

THIS PLANNING, DESIGN, ENGINEERING, AND CONSTRUCTION PROJECT AGREEMENT FOR THE DOWNTOWN KETCHUM IMPROVEMENT PROJECT (SIDEWALK RELATED IMPROVEMENTS) (the "Construction Agreement") is made and entered into this \_\_\_\_ day of \_\_\_\_\_, 2021, by and between the city of Ketchum, Idaho, a municipal corporation of the state of Idaho (the "City"), and the Urban Renewal Agency of the city of Ketchum, Idaho, also known as the Ketchum Urban Renewal Agency, an independent public body corporate and politic (the "Agency"), individually referred to as "Party" and collectively as the "Parties."

**RECITALS**

WHEREAS, the Agency is authorized to undertake and carry out urban renewal projects to eliminate, remedy, or prevent deteriorated or deteriorating areas through redevelopment, rehabilitation or conservation, or any combination thereof, within its area of operation and is authorized to carry out such projects jointly with the City;

WHEREAS, the City Council ("City Council") of the City of Ketchum (the "City") by adoption of Ordinance No. 992 on November 15, 2006, duly adopted the Ketchum Urban Renewal Plan (the "2006 Plan") to be administered by the Agency;

WHEREAS, upon the approval of Ordinance No. 1077 adopted by the City Council on November 15, 2010, and deemed effective on November 24, 2010, the Agency began implementation of the Ketchum Urban Renewal Plan 2010 (the "2010 Plan");

WHEREAS, the 2010 Plan established the Revenue Allocation Area (the "Project Area"), which Project Area is depicted on **Exhibit A**, attached hereto, and incorporated herein by reference;

WHEREAS, the 2010 Plan identified improvement to sidewalks, streets, rights-of-way, pedestrian and bicycle access, crosswalks, and safety as important objectives of the 2010 Plan;

WHEREAS, the 2010 Plan and the Project Area terminate November 15, 2030, recognizing the Agency shall receive its allocation of revenues in 2031, pursuant to Idaho Code § 50-2903(7) (the "Termination Date"). Many of the proposed improvements identified in the 2010 Plan have not been completed and continue to suffer from certain deteriorating conditions;

WHEREAS, the City seeks the Agency's funding of certain improvements to Downtown Ketchum including planning, design, engineering, and construction of improvements to the sidewalks, streets, and crosswalks (the "Sidewalk Improvements Project");

WHEREAS, preliminary estimates for the costs of the final planning, design, engineering, and construction of the Sidewalk Improvements Project total approximately \$\_\_\_\_\_;

WHEREAS, the Agency Board finds it in the best interests of the Agency to continue to enhance the development within the Project Area and in the best interests of the public to provide financial support for the Sidewalk Improvements Project;

WHEREAS, the Agency and City desire that the Sidewalk Improvements Project be planned, designed, engineered, and constructed within the Project Area during construction season in calendar 2022, reflecting Agency funding for FY 2022;

WHEREAS, the City has expressed its desire to participate with the Agency for the purpose of assisting in the planning, design, engineering and constructing the Sidewalk Improvements Project, and providing construction management services to the Agency for the Sidewalk Improvements Project;

WHEREAS, the City and the Agency hereby find and determine that this Construction Agreement enables them to cooperate to their mutual advantage in a manner that will best accord with the needs and development of the City and the Agency;

WHEREAS, the ability for the City and Agency to cooperate and jointly benefit each other is expressly allowed pursuant to Idaho Code § 50-2015;

WHEREAS, in consideration of the payment by the Agency for the Sidewalk Improvements Project costs, as more specifically defined in this Construction Agreement, the City hereby agrees to serve and perform as project manager for the final planning, design, and engineering of the Sidewalk Improvements Project; said final design to be subject to the review and approval of the Agency. Additionally, the City hereby agrees to serve and perform as project manager for the public works construction of the Sidewalk Related Improvements (including the solicitation of those services), and provide project oversight and inspection;

WHEREAS, the City has committed certain funds for its contribution to the Sidewalk Improvements Project;

WHEREAS, the Sidewalk Improvements Project described in this Agreement is part of a larger project the City is performing concerning sidewalks and improvements outside of the Project Area.

## **AGREEMENT**

NOW, THEREFORE, in consideration of the provisions contained herein and the recital set forth above which are a material part of this Agreement the parties agree as follows:

1. **Definitions.** As used in this Construction Agreement, the following words, unless the context dictates otherwise, shall have the following meanings:

**Act** shall mean collectively the Idaho Urban Renewal Law of 1965, title 50, chapter 20, Idaho Code, as amended and supplemented and the Local Economic Development Act of 1988, title 50, chapter 29, Idaho Code as amended and supplemented.

**Board** shall mean the Board of Commissioners of the Agency as the same shall be duly and regularly constituted from time to time.

**Contract** shall mean the contract through which the general contractor is awarded the construction of the Sidewalk Improvements Project.

**Contractor** shall mean the selected general contractor awarded the construction of the Sidewalk Improvements Project.

**Engineering Services** shall mean the planning, design, engineering, cost estimating, surveying work, and proposing the location of certain public improvements related to the Sidewalk Improvements Project along with the agreement with the selected Engineering Services provider, \_\_\_\_\_ and/or as performed by the City's Public Works Department.

**Sidewalk Improvements Project Design** shall mean the services related to planning, design, engineering, and proposing the location of the Sidewalk Improvements Project.

**Sidewalk Improvements Project Installation** shall mean those improvements to be constructed and installed at the Agency's expense, which improvements consist of Sidewalk Improvements Project. An illustration of the Sidewalk Related Improvements is attached as **Exhibit B**. The City and Agency shall determine the Agency's not-to-exceed obligation amount as described in Section 6.

2. **Recitals and Purpose.**

- a. The Parties agree that the foregoing recitals are not mere recitations but are covenants of the Parties, binding upon them as may be appropriate and a portion of the consideration for the agreements contained herein.

- b. The purpose of this Construction Agreement is to provide for the definition of rights, obligations, and responsibilities of the Agency and City regarding the planning, design services, engineering services, project management services, and cost estimating services for this Construction Agreement. Generally, the Agency shall be responsible for the costs of planning, design, surveying, cost estimating, engineering, and construction of the Sidewalk Improvements Project, including costs for the planning, design, engineering, and administration of the Sidewalk

Improvements Project. The City shall serve as project manager as described below. This Construction Agreement constitutes a joint agreement between the City and the Agency for the successful completion of the Sidewalk Improvements Project.

3. **City Services and Responsibilities.** City agrees to furnish its skill and judgment necessary to carry out the project administration for the Sidewalk Improvements Project.

- 3.1 Planning, Design, Engineering, and Construction. City and Agency shall coordinate hiring of necessary planning, design, engineering or landscape architectural services, cost estimating, and construction management and administration for the Sidewalk Improvements Project consistent with the public procurement and bidding requirements. These services include the completion of bid documents for advertising and securing construction bids for the Sidewalk Improvements Project. City and Agency shall jointly agree on a schedule for the completion of the bid documents. City shall provide the Agency with periodic reports and updates on the completion of the final design services, engineering services, cost estimating, and bid specifications for Agency review and comment, including approval of the final design of the Sidewalk Improvements Project.

- 3.2 Engineering Services. Agency and City acknowledge City intends to complete design and engineering services either “in house” through the City’s Public Works Department or through the City’s on-call engineers, [Company] (“[Engineer]”). The City Engineering Department or [Engineer] will provide planning, design, engineering, site location, bid preparation, and project management for the Sidewalk Improvements Project. The City Engineering Department and/or [Engineer] will be expected to site the Sidewalk Improvements Project, provide the final design and engineering services for the Sidewalk Improvements Project, prepare the bid documents, and assist in the selection of the Contractor for the Sidewalk Improvements Project. In the event additional outside engineering services are needed, both City and Agency agree to proceed through the required selection process required by state statute. In that event, Agency may determine a not-to-exceed amount for such design and engineering services. Any scope of work issued to [Engineer] shall be between the City and [Engineer].

- 3.2.1. Planning, Site Location, Architectural Design Services, and Engineering Services. [Engineer] completed a preliminary design concept illustrating the scale and relationship of the construction of the Sidewalk Improvements Project. This concept shall be the basis for the final engineering and design to be completed under this Construction Agreement. The completed scope of work shall include a specific cost estimate for the Sidewalk Improvements Project, including construction costs. If that estimate exceeds the not-to-exceed figure described in Section 6 of this Construction Agreement, the City and Agency shall mutually determine what alternatives should be pursued, including redesign, relocation, seeking additional funds, limiting the scope of the Sidewalk Improvements Project, or not proceeding further.

3.2.2. Construction Project. Upon completion of the final planning, design, and engineering work set forth in this Construction Agreement, both City and Agency agree to consider moving forward with the construction of the Sidewalk Improvements Project. The Agency's participation or contribution to the Sidewalk Improvements Project shall be limited to a not-to-exceed amount as set forth in Section 6 of this Construction Agreement, which includes the planning, design services, engineering services, and cost estimating work described herein. Nothing herein, however, commits either the City or Agency to undertake the construction of the Sidewalk Improvements Project.

3.3 Bid Solicitation and Award. City, with Agency review and input as to the bid specifications, shall solicit bids ("Bids") for the Sidewalk Improvements Project. Representatives from Agency and City shall review the Bids at opening. The City shall designate the qualified public works contractor submitting the bid in compliance with chapter 28, title 67, Idaho Code for the Sidewalk Improvements Project subject to the City's right to reject all bids.

3.4 Design and Construction. City and Agency acknowledge the conceptual design work has commenced and final design of the Sidewalk Improvements Project is at or near completion. The obligations under this Construction Agreement shall end either thirty (30) days after final payment to the Contractor under the Contract has been paid or determination by the City and Agency to not pursue the construction of the Sidewalk Improvements Project, whichever occurs first. The City shall:

- a. Provide administration of the Engineering Services to determine the location, design, engineering, and administration of the Sidewalk Improvements Project, the preparation of the bid documents for the Sidewalk Improvements Project and administration of the Contract.
- b. Provide administration of the Sidewalk Improvements Project in compliance with generally accepted standards recognizing that the Sidewalk Improvements Project is an Agency project with the City providing project management. City shall comply with all applicable statutory provisions including, but not limited to, chapter 28, title 67, Idaho Code;
- c. Provide necessary project management and oversight to assure Contractor's timely progress and process all invoices and payment requests, verify Contractor's entitlement to all progress payments or other payments requested by Contractor;
- d. Recommend necessary or desirable changes to the Agency and, if accepted, prepare, and sign necessary change orders;

- e. Inspect the work and advise the Agency whenever work fails to conform with the Contract documents;
- f. Receive and hold all certificates of insurance required by the Contract;
- g. Provide monthly progress reports to Agency either in writing or by presentation to Agency at Agency's board meetings;
- h. Assist in the interpretation of the drawings and specifications among the City, Agency, and the Contractor;
- i. Maintain all necessary records, documents, drawings, and other related documents normally maintained for a public works project; and
- j. Determine when the Sidewalk Improvements Project or a designated portion thereof is substantially complete, issue Certificates of Substantial Completion (if necessary), and determine when the work is ready for final inspection and final payment to the Contractor.
- k. The Contract for Engineering Services and with the Contractor for construction of the Sidewalk Improvements Project shall be between the City and the selected Contractor.

3.5 City Contribution. The Sidewalk Related Improvements as described in this Agreement within the Project Area and funded through the Agency is part of a larger overall improvement project to certain streets and sidewalks the City intends to pursue in 2022. The City has budgeted \$\_\_\_\_\_ for that work. In addition, as contribution to the Sidewalk Related Improvements, City agrees to contribute \$\_\_\_\_\_. Alternatively, as defined in Section 6 of this Agreement, City may agree to forego reimbursement for internal costs of City personnel in performing the services described in this Agreement.

- 4. **Agency and City Obligations.** The purpose of this Construction Agreement is to provide for the definition of rights, obligations and responsibilities of the Agency and City regarding the construction of the Sidewalk Improvements Project.
- 5. **Effective Date.** This Construction Agreement shall be effective upon execution of the Construction Agreement by Agency's Chairman of the Board of Commissioners and the Mayor of the City and/or the City Manager, as the case may be.
- 6. **Method of Reimbursement.** As consideration for the City Services and Responsibilities set forth above, the Agency shall pay for the costs of the Sidewalk Improvements Project, including planning, design and engineering services and project management and



administration by the City. Such costs shall not exceed \$\_\_\_\_\_, including the project administration costs imposed by the City. If after the opening of the Bids, the estimated construction costs for the Sidewalk Improvements Project, including planning, design, and engineering costs, exceeds \$\_\_\_\_\_, the City shall request in writing the approval of the Agency for the additional funds. Such request shall be made prior to awarding the contract and incurring any costs in excess of \$\_\_\_\_\_.

In order to provide sufficient documentation to ensure compliance, the City shall provide the Agency with the following information in monthly invoices and in a final invoice upon completion of the Sidewalk Improvements Project:

- a. requests for payment for billing invoices received from [Engineer] for Engineering Services and the Contractor for work related to the Sidewalk Improvements Project with sufficient documentation to ensure accuracy;
- b. accounting of the Direct Personnel Expense and Reimbursable Costs (defined below);
- c. certification by the City Public Works Director or designee that the costs incurred for Engineering Services and construction services are consistent with the scope of the Sidewalk Improvements Project; and
- d. monthly reports on the Sidewalk Improvements Project's status as described above.

Upon receipt and approval of the monthly invoice, Agency shall remit payment to City for all approved amounts within forty-five (45) days of Agency's receipt of an invoice or payment request. If Agency disputes any amount, Agency shall pay the undisputed amount within forty-five (45) days and reasonably cooperate with City to resolve the disputed amount. City shall include this payment process within the Contract with the selected contractor and the agreement with the selected Engineering Services firm.

City shall, upon completion of the Sidewalk Improvements Project, submit an invoice for all Direct Personnel Expense and Reimbursable Costs incurred by City for design, engineering, project management, and construction inspection. If Agency disputes any amount, Agency shall pay the undisputed amount within forty-five (45) days and reasonably cooperate with the City to resolve the disputed amount. The purpose of this section is to provide for payment of Sidewalk Improvements Project costs directly by the Agency.

Direct Personnel Expense is defined as that portion of the direct salaries of all of the City's personnel engaged on the Sidewalk Improvements Project and the portion of the cost of their mandatory and customary contributions and benefits related thereto such as

employment taxes and other statutory employee benefits, insurance, sick leave, holidays, vacations, pensions, and similar contributions and benefits.

The term Reimbursable Costs shall mean costs necessarily incurred by the City in the proper performance of services which directly benefit the Sidewalk Improvements Project. Such costs shall be at rates not higher than the standard paid in Blaine County for a public works project, except as may be approved by prior consent of the Agency. City, in its sole and unilateral discretion, may decide to forego reimbursement for expenses incurred for administration of the Sidewalk Improvements Project as its contribution to the Sidewalk Improvements Project.

7. **Records.** Records of Sidewalk Improvements Project costs, Reimbursable Costs and costs pertaining to Direct Personnel Expense shall be kept on the basis of generally accepted accounting principles and shall be available to the Agency or the Agency's authorized representative at mutually convenient times.
8. **Insurance.**
  - a. The City (either itself or the selected Contractor) shall purchase and maintain, for the benefit of the City and the Agency, insurance for protection from claims under the worker's compensation law of the state of Idaho arising from work performed on the Sidewalk Improvements Project; claims for damages because of bodily injury, including personal injury, sickness, disease, or death of any of the City's employees or of any person while working on the Sidewalk Improvements Project; claims for damages because of injury to or destruction or loss of use of tangible property as a result of work on the Sidewalk Improvements Project; and claims arising out of the performance of this Construction Agreement and caused by negligent acts for which the City is legally liable. The terms and limits of liability shall be determined solely by the City, and nothing herein shall be construed as any waiver of any claim or defense by the City or the Agency premised upon any claim of sovereign immunity or arising from the Idaho Tort Claims Act. The amount of insurance shall be in the amounts set forth in the Idaho Tort Claims Act.
  - b. The City shall also purchase and maintain for the benefit of the City and Agency property damage insurance for any property damage to the Sidewalk Improvements Project or other property owned by the City.
9. **Indemnity.** Only to the extent permitted by Idaho law, the City shall defend, indemnify and hold Agency and their respective officers, agents, and employees harmless from and against all liabilities, obligations, damages, penalties, claims, costs, charges, and expenses, including reasonable planning, design and engineering fees and attorney fees (collectively referred to in this section as "Claim"), which may be imposed upon or incurred by or asserted against Agency or its respective officers, agents, and employees relating to the planning, design and engineering of the Sidewalk Improvements Project or otherwise

arising out of this Construction Agreement. In the event an action or proceeding is brought against Agency or their respective officers, agents, and employees by reason of any such Claim, City, upon written notice from Agency, shall, at City's expense, resist or defend such action or proceeding.

Notwithstanding the foregoing, City shall have no obligation to indemnify and hold Agency and its respective officers, agents, and employees harmless from and against any matter to the extent it arises from the negligence or willful act of Agency or its respective officers, agents, or employees or from conduct resulting in an award of punitive damages against Agency.

10. **Amendment.** This entire Construction Agreement may be amended at any time and from time to time by the mutual written consent of the City and the Agency.
11. **Severability.** In the event any provision of this Construction Agreement shall be declared by a court of competent jurisdiction to be invalid, illegal, or unenforceable, the validity, legality, and enforceability of the remaining provisions shall not in any way be affected or impaired thereby.
12. **Notice.** Any and all notices required to be given by either of the Parties hereto, unless otherwise stated in this Construction Agreement shall be in writing and be deemed communicated when mailed in the United States mail, certified, return receipt requested, addressed as follows:

To Agency:

Ed Johnson, Chair  
Ketchum Urban Renewal Agency  
P.O. Box 2315  
Ketchum, ID 83340

To City:

City of Ketchum  
P.O. Box 2315  
Ketchum, ID 83340

13. **Non-Waiver.** Failure of either party to exercise any of the rights under this Construction Agreement, or breach thereof, shall not be deemed to be a waiver of such right or a waiver of any subsequent breach.
14. **Choice of Law.** Any dispute under this Construction Agreement, or related to this Construction Agreement, shall be decided in accordance with the laws of the state of Idaho.
15. **Attorney Fees.** Should any litigation be commenced between the Parties hereto concerning this Construction Agreement, the prevailing party shall be entitled, in addition to any other relief as may be granted, to costs and reasonable attorneys' fees as determined by a court or arbitrator of competent jurisdiction. This provision shall be deemed to be a separate contract between the Parties and shall survive any default, termination, or forfeiture of this Construction Agreement.

16. **Authority to Execute.** Agency and City have duly authorized and have full power and authority to execute this Construction Agreement.
17. **Assignment.** It is expressly agreed and understood by the Parties hereto that City shall not have the right to assign, transfer, hypothecate, or sell any of its rights under this Construction Agreement except upon the prior express written consent of Agency.
18. **Disputes.** In the event that a dispute arises between Agency and City regarding application or interpretation of any provision of this Construction Agreement, the aggrieved party shall promptly notify the other party to this Construction Agreement of the dispute within ten (10) days after such dispute arises. If the Parties shall have failed to resolve the dispute within thirty (30) days after delivery of such notice, each party shall have the right to pursue any rights or remedies it may have at law or in equity.
19. **Entire Agreement.** This Construction Agreement along with any and all exhibits attached hereto and incorporated herein by reference contains and integrates all of the terms and conditions mentioned herein or incidental hereto and supersedes all negotiations or previous agreements between the parties with respect to all or any part of the Project.

IN WITNESS WHEREOF, the parties hereto, through their respective governing boards, have executed this Construction Agreement on the date first cited above.

CITY OF KETCHUM

By \_\_\_\_\_  
Neil Bradshaw, Mayor

ATTEST:

\_\_\_\_\_  
City Clerk

KETCHUM URBAN RENEWAL AGENCY

By \_\_\_\_\_  
Ed Johnson, Chairman

ATTEST:

\_\_\_\_\_  
Secretary

**Exhibit A**

(Project Area Map)

**Exhibit B**

(Illustration of the Sidewalk Related Improvements)

4851-1830-0415, v. 2