

**TOWN OF LYONS, COLORADO
CONSTRUCTION AGREEMENT**

**North Overflow Channel Project
Project Number: ITB-DH-2017-04 ("Project")**

This AGREEMENT is made and entered into this 1st day of May, 2017, by and between the TOWN OF LYONS, COLORADO, a municipal corporation of the State of Colorado, with offices at 432 5th Avenue, Lyons, Colorado 80540 (the "**Town**" or "**Owner**"), and DeFalco Construction Company, a Colorado corporation, whose principal office mailing address is P.O. Box 820, Longmont, CO 80502 (the "**Contractor**"), and shall be effective as of the date of mutual execution by the Parties.

WITNESSETH

WHEREAS, the Town desires to obtain all necessary components to complete the scope of work for the North Overflow Channel Project, Project No. **ITB-DH-2017-04** (the "**Project**"); and

WHEREAS, the Town issued an Invitation to Bid and Bid Package for the Project ("**Bid Pack**") through the Rocky Mountain E-Purchasing System ("**RMEPS**") on March 25, 2017, and subsequently issued two addenda for the Project dated April 5, 2017 and April 11, 2017; and

WHEREAS, a copy of the Bid Pack and addenda are attached to this Agreement as **Exhibit A** and is incorporated into this Agreement by reference; and

WHEREAS, in response to the Bid Pack, the Town received bids or proposals, including one from the Contractor ("**Bid Proposal**"), a copy of which is attached to this Agreement as **Exhibit B** and is incorporated into this Agreement by reference; and

WHEREAS, the Town has reviewed the Bid Proposal from the Contractor for the completion of said work, and the Town finds said Bid Proposal acceptable and deems it the lowest responsible and responsive bid proposal received; and

WHEREAS, the Town desires to enter into this Agreement with the Contractor subject to the terms of this Agreement and all other Contract Documents as defined in Section 2.00 of this Agreement.

NOW, THEREFORE, for the consideration herein expressed, it is agreed as follows by and between the Town and the Contractor that the Contractor shall perform the following:

THE PARTIES AGREE AS FOLLOWS:

1.00 SCOPE OF WORK: The Contractor will furnish all tools, equipment, machinery, materials, supplies, superintendence, insurance, transportation, and other construction accessories, and services specified or required to be incorporated in and form a permanent part of the construction and completion of the work proposed to be done under this Agreement as described more specifically in **Exhibit A** and **Exhibit B** ("**Work**" or "**Scope of Work**"). In addition, the Contractor shall provide and perform all necessary labor in a first-class and workmanlike manner and in accordance with the conditions and prices stated in the Bid Proposal and the requirements, stipulations, provisions, and conditions of the Contract Documents and Design Documents, including Plans and Specifications, as defined in the attached General Conditions. The Contractor shall further perform, execute, construct, and complete all things mentioned to be done by the Contractor and all

work covered by the Owner's official award of this contract to the Contractor, such award being based on the acceptance by the Owner of the Contractor's bid, or part thereof.

2.00 THE CONTRACT DOCUMENTS: This Agreement incorporates all the Contract Documents, which together represent the entire and integrated agreement between the parties hereto and supersede prior negotiations, written or oral representations and agreements. The Contract Documents consist of this Construction Agreement, which Agreement also incorporates by this reference all of the instruments set forth in the Project Manual and Bid Documents as fully as if they were set forth in this Agreement in full; the Bid Pack, including all documents incorporated into the Bid Pack by reference (**Exhibit A**), and the Bid Proposal (**Exhibit B**). The Contract Documents consist of without limitation, the following documents:

1. Invitation to Bid and Instructions to Bidders
2. Contractor's Bid Form (with Unit Pricing as indicated)
3. This Construction Agreement and any Addendums or Attachments thereto including (if checked)
 - ☐ Attachment A, Federal Emergency Management Agency's ("FEMA") Grant Program Requirements for Procurement Contracts if FEMA funding is used for the Work
 - ☐ Attachment B, Colorado Community Development Block Grant Disaster Recovery Program funds (hereinafter referred to as CDBG-DR funds) Requirements for Contracts if CDBG-DR funding is used for the Work
 - ☐ Attachment C, Department of Commerce Economic Development Administration ("EDA") Requirements for Procurement Contracts if EDA funding is used for the Work.
 - ☒ ADDENDUM TO CONTRACT, Colorado Community Development Block Grant Disaster Recovery Program funds (hereinafter referred to as CDBG-DR funds) PUBLIC INFRASTRUCTURE PROGRAM REQUIRED PROCUREMENT AND CONTRACT DOCUMENTS if CDBG-DR funding is used for the Work
4. Performance and Payment Bond
5. Bid Proposal
6. Notice of Award
7. Notice to Proceed
8. Bid Bond (Minimum 5% equivalent of the Bid Proposal price or as otherwise set forth in the Bid Bond form provided as part of the Bid Pack)
9. General Conditions
10. The Following Documents if the Box is Checked:
 - ☒ Special Provisions
 - ☒ Design Documents, including all Drawings and Plans
 - ☒ Specifications
 - ☒ Addendums to Specifications and Standards
 - ☒ Town of Lyons Manual of Design Criteria and Standard Specifications
 - ☒ Change Orders, Field Orders or other similar revisions properly authorized after the execution of this Agreement
 - ☒ Others: 2011 CDOT STANDARDS FOR ROAD AND BRIDGE CONSTRUCTION WITH STANDARD AMENDMENTS, EXCEPT AS SUPERSEDED BY TOWN SPECIFICATIONS and 2012 CDOT M&S STANDARD PLANS

3.00 TIME AND COMMENCEMENT OF COMPLETION: This Agreement shall be effective as of the date the Agreement is fully executed by both parties and the Contractor further agrees that the Work will be completed on or before June 15, 2017, unless the Town extends the time for completion as provided in the Contract documents, at which time all Contractor obligations (except warranty) must be complete.

4.00 LIQUIDATED DAMAGES: All time limits stated in this Agreement and the Contract Documents are of

the essence of the Agreement. The Town and Contractor recognize the completion of the work as shown in the contractual time frame, or as extended, is important to the ongoing operations of the Town and its citizens. They also recognize that delays include expenses to the Town for extended manpower commitments, outside consultant commitments, and potentially other legal fees to extend the project beyond the expected time period.

☒ If this box is checked, in lieu of requiring any such proof and backup for such expenses, Contractor agrees that liquidated damages (not penalties) may be assessed by the Owner in the sum of **\$500.00 per day** for each day after the contract time frame expires

☐ If this box is checked, in addition or in lieu of the daily damages (if checked above), Contractor agrees that lump sum liquidated damages (not penalties) may be assessed by the Town in a *lump sum payment of* \$ _____ .00 *if the work is not completed by* _____ , 20__.

5.00 CONTRACT SUM AND PAYMENT: The Owner shall pay to the Contractor for performance of the Work encompassed by this Agreement, and the Contractor will accept as full compensation therefore the sum of:

ONE HUNDRED TWENTY-ONE THOUSAND SIX HUNDRED SIX DOLLARS AND NINE CENTS (\$121,606.09) subject to adjustment as provided by the Contract Documents ("Contract Price"). The Town has appropriated sufficient funds for completion of this Work.

- a. Monthly, partial, progress payments shall be made by the Town to the Contractor for the percentage of the Work completed, subject to inspection by Town staff to verify percentage of completion. The Town alone shall determine when work has been completed and progress payments shall not constitute a waiver of the right of the Town to require the fulfillment of all terms of this Agreement and the delivery of all improvements embraced in this Agreement complete and satisfactory to the Town in all details. The Town, before making any payment, may require the Contractor to furnish releases or receipts from any or all persons performing work under this Agreement and/or supplying material or services to the Contractor, or any subcontractor if this is deemed necessary to protect the Town's interest. The Town, however, may in its discretion make payment in part or full to the Contractor without requiring the furnishing of such releases or receipts.
- b. By the 25th day of each month, Contractor shall submit to the Town for review and approval, an application for payment fully completed and signed by Contractor covering the work completed through the last day of the prior month and accompanied by such supporting documentation as is required by these Contract Documents, including without limitation, time sheets, invoices, receipts, bills of lading, and all other documents the Town may require. Materials on hand but not complete in place may or may not be included for payment at the discretion of the Town. **These applications for payment should be emailed to ap@townoflyons.com or mailed to: Town of Lyons, PO Box 49, Lyons, CO 80540.** Each subsequent application for payment shall include an affidavit of Contractor providing that all previous progress payments received on account of the work have been applied to discharge in full all of Contractor's obligations reflected in prior applications for payment. Notwithstanding the progress payments, Town shall withhold at least five percent (5%) of payments to Contractor in accordance with Section 103(1)(a), Article 91, Title 24, C.R.S.
- c. Pursuant to Section 103.6(2) of Article 91, Title 24, C.R.S. (2016), no change order that increases the Contract Price shall be approved unless the Town has appropriated sufficient funds to cover the cost of such an increase and has provided the Contractor written assurance that lawful appropriations to cover the costs of the additional work have been made and appropriations are available prior to performance of the additional work unless such work is covered by a remedy-granting provision of this Agreement.

6.00 ACCEPTANCE AND FINAL PAYMENT: Final payment may be requested by the Contractor upon completion and acceptance, by the Town, of all work as set forth in the Contract Documents. The total amount of final payment shall consist of the Contract Price, as adjusted in accordance with approved change orders, if applicable, less all previous payments to the Contractor. The retainage amount set forth in Paragraph b of Section 5.00 of this Agreement shall not be released to the Contractor until the Town has complied with the applicable final payment procedures specified in Section 107(1) of Article 26, Title 38, C.R.S. (2016).

7.00 MODIFICATIONS AND AMENDMENTS: Should work beyond that described in the Contract Documents be required, it will be paid for as extra work at a cost to be agreed upon in separate written agreement by the Town and the Contractor prior to commencement of the additional work. Such additional agreements shall be executed and approved by all persons required by Town purchasing ordinances or policies. Unless specifically excluded, such written agreements shall be considered part of the Contract Documents. Pursuant to the Lyons Municipal Code, the Town Administrator is authorized to approve all contract modifications for construction contracts in any amount of ten thousand dollars (\$10,000.00) or less. The Board of Trustees possesses the sole authority to approve all contract modifications in any amount over ten thousand dollars (\$10,000.00) for construction contracts. Any requested change order or minor change is subject to the Town of Lyons General Conditions attached hereto and incorporated into this Agreement.

8.00 CONTRACTOR'S REPRESENTATIONS: In order to induce the Town to enter into this Agreement, the Contractor makes the following representations:

- a. The Contractor has familiarized itself with the nature and the extent of the Contract Documents, Scope of Work, the locality, all physical characteristics of the area of the work within the Scope of Work, including without limitation, improvements, soil conditions, drainage, topography, and all other features of the terrain, and with the local conditions and federal, state, and local laws, ordinances, rules, and regulations that in any manner may affect cost, progress, or performance of the work, or apply in any manner whatsoever to the work.
- b. Contractor has carefully considered all physical conditions at the site and existing facilities affecting cost, progress, or performance of the work.
- c. Contractor has given the Town written notice of all conflicts, errors, or discrepancies that it has discovered in the Contract Documents and such documents are acceptable to the Contractor.
- d. Contractor shall not extend the credit or faith of the Owner to any other persons or organizations.

9.00 INSURANCE: Contractor agrees to procure and maintain, at its own cost, a policy or policies of insurance sufficient to insure against all obligations assumed by the Contractor pursuant to this Agreement. Contractor shall not commence work under this Agreement until it has obtained all said insurance required by the Contract Documents and such insurance has been approved by the Town. The Contractor shall not allow any subcontractor to commence work on this project until all similar insurance required of the subcontractor has been obtained and approved. For the duration of this Agreement, the Contractor must continuously maintain the insurance coverage required in this section, with the minimum insurance coverage listed below:

- a. Worker's Compensation in accordance with the Worker's Compensation Act of the State of Colorado and any other applicable laws for any employee engaged in the performance of Work under this Agreement.
- b. Comprehensive General liability insurance with minimum limits of ONE MILLION DOLLARS (\$1,000,000) per each occurrence, AND ONE MILLION DOLLARS (\$1,000,000) aggregate, plus an additional amount sufficient to pay related attorneys' fees and defense costs. The policy shall be applicable to all premises and operations. The policy shall include coverage for bodily injury, broad form property damage (including completed operations), personal injury (including coverage for contractual and employee acts), blanket contractual, independent contractors, products, and completed operations. The policy shall include coverage for explosion, collapse, and underground hazards. The policy shall contain a severability of interests provision.

c. Comprehensive Automobile Liability insurance with minimum limits for bodily injury and property damage of not less than FIVE HUNDRED THOUSAND DOLLARS (\$500,000) per each occurrence, plus an additional amount sufficient to pay related attorneys' fees and defense costs, with respect to each of the Contractor's owned, hired or non-owned vehicles assigned to or used in performance of this contract.

d. Builder's Risk insurance with minimum limits of not less than the insurable value of the work to be performed under this contract at completion less the value of the materials and equipment insured under installation floater insurance. The policy shall be written in completed value form and shall protect the Contractor and the Town against risks of damage to buildings, structures, and materials and equipment not otherwise covered under Installation Floater insurance, from the perils of fire and lightning, the perils included in the standard coverage endorsement, and the perils of vandalism and malicious mischief. Equipment such as pumps, engine-generators, compressors, motors, switch-gear, transformers, panel-boards, control equipment, and other similar equipment shall be insured under Installation Floater insurance when the aggregate value of the equipment exceeds \$10,000. The policy shall provide for losses to be payable to the Contractor and the Town as their interests may appear. The policy shall contain a provision that in the event of payment for any loss under the coverage provided, the insurance company shall have no rights of recovery against the Contractor or the Town.

e. ☐ If this box is checked, Professional Liability/Errors and Omission in an amount not less than _____ MILLION DOLLARS (\$_____,000,000).

Certificates of insurance shall be completed by the Contractor's insurance agent as evidence that policies providing the required coverage, conditions, and minimum limits are in full force and effect, and shall be subject to review and approval by the Town. The policies required above shall be endorsed to include the Town and the Town's officers and employees as additional insureds. Every policy required above shall be primary insurance and any insurance carried by the Town, its officers, or its employees, or carried by or provided through any self-insurance pool of the Town, shall be excess and not contributory insurance to that provided by the Contractor. Contractor shall be solely responsible for paying any and all deductibles.

Each certificate shall identify this Agreement or the project set forth in the Scope of Work and shall provide that the coverage afforded under the policies shall not be cancelled, terminated or materially changed until at least 30 days prior written notice has been given to the Town. If the words "endeavor to" appear in the portion of the certificate addressing cancellation, those words shall be stricken from the certificate by the agent(s) completing the certificate. The Town reserves the right to request and receive a certified copy of any policy and any endorsement thereto.

10.00 BONDS: Contractor shall furnish a performance bond, payment bond, and warranty bond in an amount determined by the Town, but in any event at least equal to the Contract Price, as security for the faithful performance and payment of all Contractor's obligations under the Contract Documents, including but not limited to the guaranty period. These bonds shall remain in effect at least until one year after the date of final payment. All bonds shall be in the forms prescribed by the Contract Documents and be executed by such sureties as (i) are licensed to conduct business in the State of Colorado and (ii) are named in the current list of "Companies Holding Certificates of Authority as Acceptable Sureties on Federal Bonds and as Acceptable Reinsuring Companies" as published in Circular 570, amended, by the Audit Staff, Bureau of Account, U.S. Treasury Department. All bonds signed by an agent must be accompanied by a certified copy of the authority to act. If the surety on any bond furnished by the Contractor is declared bankrupt or becomes insolvent, or its right to do business in Colorado is terminated, or it ceases to meet the requirements of clauses (i) and (ii) of this section, Contractor shall, within five (5) days thereafter, substitute another bond and surety, both of which shall be acceptable to the Town.

11.00 NO WAIVER OF GOVERNMENTAL IMMUNITY: The parties hereto understand and agree that the parties are relying on, and do not waive or intend to waive by any provision of this Agreement or the remainder of the Contract Documents, the monetary limitations or any other rights, immunities, and protections provided by the Colorado Governmental Immunity Act, C.R.S. §24-10-101 et seq., as from time to time amended, or otherwise available to the Parties, their elected officials, officers, agents or employees.

12.00 INDEMNIFICATION: The Contractor agrees, to the fullest extent permitted by law, to indemnify, defend and hold the Town, the United States Government, United States Department of Housing and Urban Development ("HUD") (if HUD funding is part of the funding for the Work), the State of Colorado, their agencies, employees, officials and agents ("Indemnitees") harmless from any and all claims, settlements, judgments, damages and costs, including reasonable attorney fees, of every kind and nature made, to include all costs associated with the investigation and defense of any claim, rendered or incurred by or on behalf of the Indemnitees, that may arise, occur, or grow out of any errors, omissions, or negligent acts, done by the Contractor, its employees, subcontractors or any independent consultants working under the direction of either the Contractor or any subcontractor in the performance of this Agreement. The Contractor is not obligated to indemnify the Town for the Town's own negligence.

13.00 TERMINATION FOR CONVENIENCE: This Agreement and the performance of the Scope of Work hereunder may be terminated at any time in whole, or from time to time in part, by the Town for its convenience. Any such termination shall be effected by delivery to the Contractor of a written notice ("Notice of Termination") specifying the extent to which performance of the Scope of Work is terminated and the date upon which termination becomes effective. If the Agreement is terminated, the Contractor shall be paid on a pro rated basis of work status satisfactorily completed, under the detailed Scope of Work. The portion of the Scope of Work satisfactorily completed but not yet accepted by the Town shall be determined by the Town.

14.00 EVENTS OF AND TERMINATION FOR DEFAULT:

- (1) The Town may serve written notice upon the Contractor of its intention to terminate this Agreement in the presence of one of the following events of default:
 - a. Contractor should fail to initiate the Scope of Work at the agreed upon time;
 - b. The performance of the Scope of Work is being unnecessarily or unreasonably delayed;
 - c. The Scope of Work is not completed within the time specified or within the time to which completion of the Scope of Work has been extended;
 - d. Contractor should fail to make prompt payments for labor, materials or to subcontractors;
 - e. Contractor shall willfully violate this Agreement or disregard laws, ordinances or instructions of the Town;
 - f. Contractor shall abandon performance of the Scope of Work;
 - g. The Contract or any part thereof has been assigned, transferred or sublet without Town approval;
 - h. Contractor shall become insolvent or adjudged bankrupt; or
 - i. Contractor shall refuse to remove materials or perform any work within the Scope of Work as shall have been rejected as defective or unsuitable.

- (2) Such written notice shall contain the reasons for the intention to terminate this Agreement and provide a five (5) business day period during which the Contractor may cure the event of default. A failure to timely cure the event of default shall authorize the Town to immediately terminate this Agreement and take whatever steps it deems necessary to complete the Scope of Work, if so desired by the Town in its sole discretion. The costs and charges incurred by the Town, together with the costs of completion of the Scope of Work shall be deducted from any monies owed to Contractor. If the expense incurred by the Town is greater than the sums payable under this Agreement, the Contractor shall pay the Town, within sixty (60) days of demand therefor the amount of such excess cost suffered by the Town.

15.00 LIABILITY FOR EMPLOYMENT-RELATED RIGHTS AND COMPENSATION: The Contractor will comply with all laws, regulations, municipal codes, and ordinances and other requirements and standards applicable to the Contractor's employees, including, without limitation, federal and state laws governing wages and overtime, equal employment, safety and health, employees' citizenship, withholdings, reports and record keeping. Accordingly, the Town shall not be called upon to assume any liability for or direct payment of any salaries, wages, contribution to pension funds, insurance premiums or payments, workers' compensation benefits or any other amenities of employment to any of the Contractor's employees or any other liabilities whatsoever, unless otherwise specifically provided herein.

The Town will not include the Contractor as an insured under any policy the Town has for itself. The Town shall not be obligated to secure nor provide any insurance coverage or employment benefits of any kind or type to or for the Contractor or the Contractor's employees, sub-consultants, subcontractors, agents, or representatives, including but not limited to coverage or benefits related to: local, state, or federal income or other tax contributions, FICA, workers' compensation, unemployment compensation, medical insurance, life insurance, paid vacations, paid holidays, pension or retirement account contributions, profit sharing, professional liability insurance, or errors and omissions insurance. The following disclosure is provided in accordance with Colorado law:

CONTRACTOR ACKNOWLEDGES THAT NEITHER IT NOR ITS AGENTS OR EMPLOYEES ARE ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS UNLESS CONTRACTOR OR SOME ENTITY OTHER THAN THE TOWN PROVIDES SUCH BENEFITS. CONTRACTOR FURTHER ACKNOWLEDGES THAT NEITHER IT NOR ITS AGENTS OR EMPLOYEES ARE ENTITLED TO WORKERS' COMPENSATION BENEFITS. CONTRACTOR ALSO ACKNOWLEDGES THAT IT IS OBLIGATED TO PAY FEDERAL AND STATE INCOME TAX ON ANY MONEYS EARNED OR PAID PURSUANT TO THIS AGREEMENT.

To the maximum extent permitted by law, the Contractor waives all claims against the Town for any Employee Benefits; the Contractor will defend the Town from any claim and will indemnify the Town against any liability for any Employee Benefits for the Contractor imposed on the Town; and the Contractor will reimburse the Town for any award, judgment, or fine against the Town based on the position the Contractor was ever the Town's employee, and all attorneys' fees and costs the Town reasonably incurs defending itself against any such liability.

16.00 GOVERNING LAW AND VENUE: Venue for any and all legal matters regarding or arising out of the transactions covered herein shall be solely in the District Court in and for Boulder County, State of Colorado. This transaction shall be governed by the laws of the State of Colorado.

17.00 ASSIGNMENT: The Contractor shall not assign any of his rights or obligations under this Agreement without the prior written consent of the Town. Upon any assignment even though consented to by the owner, the Contractor shall remain liable for the performance of the work under this agreement.

18.00 LAWFUL PERFORMANCE: It is further agreed that no party to this Agreement will perform contrary to any

state, federal, or county law, or any of the ordinances of the Town of Lyons, Colorado.

19.00 INVALID SECTIONS: Should any section of this Agreement be found to be invalid, it is agreed that all other sections shall remain in full force and effect as though severable from the invalid part.

20.00 AGREEMENT CONTROLS: In the event a conflict exists between this Agreement and any term in any exhibit or document attached or incorporated into this Agreement, the terms in this Agreement shall supersede the terms in such exhibit.

21.00 NOTICE: Any notice required or permitted by this Agreement shall be in writing and shall be deemed to have been sufficiently given for all purposes if sent by delivery of same in person to the addressee or by courier delivery via Federal Express or other nationally recognized overnight air courier service, by electronically-confirmed facsimile or email transmission, or by depositing same in the United States mail, postage prepaid, addressed as follows:

The Town: Town of Lyons
 Attention: Town Administrator
 432 5th Avenue
 P O Box 49
 Lyons, CO 80540

With copies to: Town of Lyons Town Attorney
 c/o Michow, Cox, and McAskin, LLP
 6530 S. Yosemite Street, Suite 200
 Greenwood Village, CO 80111

Contractor: DeFalco Construction Company
 Tony DeFalco
 P.O. Box 820
 Longmont, CO 80502

SIGNATURE PAGE FOLLOWS

THIS AGREEMENT is executed and made effective as provided above.

TOWN OF LYONS, COLORADO:

Approval by Town Board of Trustees

By: _____
Mayor or Mayor Pro Tem

ATTEST:

Debra K. Anthony Town Clerk

APPROVED AS TO FORM (*Excluding Exhibits*)

☐ Not Required



For Town Attorney's Office

**DEFALCO CONSTRUCTION COMPANY, a
Colorado corporation:**

By: _____

Printed name: Tony DeFalco, its President

STATE OF _____)
COUNTY OF _____) ss.

The foregoing Construction Agreement was acknowledged before me this _____ day of _____,
2017, by _____ as _____ of _____,
_____, a _____.

Witness my hand and official seal.

My commission expires: _____.

Notary Public

(Required for all contracts (C.R.S. § 8-40-202(2)(b)(IV)))

EXHIBIT A

BID PACK AND ADDENDA

EXHIBIT B

BID PROPOSAL – DEFALCO CONSTRUCTION