

**INDIAN NATIONS COUNCIL OF GOVERNMENTS (INCOG)
PROJECT FINANCING, SUBCONTRACTING, CONSTRUCTION AGREEMENT**

TRAVEL WITH CARE: SS4A IMPLEMENTATION PROJECT

FHWA Award No. 693JJ32440128

This Agreement, made the day and year last written below, by and between CITY of Broken Arrow, hereinafter referred to as CITY, and the Indian Nations Council of Governments, hereinafter referred to as INCOG, for the following intents and purposes and subject to the following terms and conditions, to wit:

WITNESSETH

WHEREAS, CITY supported INCOG's request that low cost, high impact intersection and roadway safety countermeasures are approved by USDOT through the Safe Streets and Roads for All (SS4A) program and described as follows:

The Project (PROJECT) will advance low-cost, high-impact strategies and countermeasures for improving intersections and roadways within the CITY (As described in PROJECT narrative). INCOG will administer the grant and manage funds, while the partner entity will implement projects identified in the application and seek reimbursement from INCOG.

WHEREAS, INCOG is The Metropolitan Planning Organization (MPO) for the Tulsa urban area. As such, INCOG facilitates a cooperative effort with federal, state, and local governments and other transportation agencies to assess the area's transportation requirements and to develop comprehensive, multi-modal plans and programs that address the needs and goals of the region; and,

WHEREAS, INCOG is, by terms of agreements with the Federal Highway Administration (FHWA), responsible for the management, design and construction of the SAFE STREETS FOR ALL IMPLEMENTATION PROJECT, hereinafter referred to as the PROJECT; and,

WHEREAS, CITY has been identified as the beneficiary and sub-recipient of the federally funded PROJECT as defined under 2CFR Part 200.331; and,

WHEREAS, receipt of the benefits of this PROJECT will require that CITY assume certain financial responsibilities as listed under 2 CFR Part 200; and,

WHEREAS, CITY is a municipal corporation created and existing under the constitution and laws of the State of Oklahoma; and

WHEREAS, the laws and constitution of the State of Oklahoma impose financial restrictions on CITY and its ability to ensure financial obligations; and,

WHEREAS, the Parties hereto recognize those financial limitations and agree that the financial obligations assumed by CITY, by the terms of this Agreement, are enforceable only to the extent as may be allowed by law or as may be determined by a court of competent jurisdiction; and,

WHEREAS, it is understood that, by virtue of the Article 10, Section 26 of the Oklahoma Constitution, the payment of CITY funds in the future will be limited to appropriations and available funds in the then current CITY fiscal year.

NOW, THEREFORE: INCOG and CITY, in consideration of the mutual covenants and stipulations as set forth herein, do mutually promise and agree as follows:

SECTION 1: PROJECT AGREEMENT

1.1 When applicable, INCOG will recommend approval of the PROJECT by the FHWA.

1.2 CITY agrees to comply with Title VI of the Civil Rights Act of 1964, 78 Stat. § 252, 42 U.S.C. § 2000d et seq., and all requirements imposed by or pursuant to Title 49, Code of Federal Regulations, Part 21 - "Nondiscrimination in federally assisted programs of the Department of Transportation - effectuation of Title VI of the Civil Rights Act 1964".

1.3 INCOG and CITY mutually recognize that each party is a governmental entity subject to the provisions of the Governmental Tort Claims Act (51 O.S. § 151 et seq.). INCOG and CITY hereby mutually agree that each is and may be held severally liable for any and all claims, demands, and suits in law or equity, of any nature whatsoever, paying for damages or otherwise, arising from any negligent act or omission of any of their respective employees, agents or contractors which may occur during the prosecution or performance of this Agreement to the extent provided in the Governmental Tort Claims Act. Each party agrees to severally bear all costs of investigation and defense of claims arising under the Governmental Tort Claims Act and any judgments which may be rendered in such cause to the limits provided by law. Nothing in this section shall be interpreted or construed to waive any legal defense which may be available to a party or any exemption, limitation or exception which may be provided by the Governmental Tort Claims Act.

1.4 CITY understands that should it fail to fulfill its responsibilities under this Agreement, such a failure may disqualify CITY from future Federal-aid funding participation on any proposed PROJECT. Federal-aid funds may be withheld until such a time as any deficiencies identified have been resolved satisfactorily to INCOG or the improvements

to be constructed under this Agreement are brought to a satisfactory condition of maintenance.

SECTION 2: ENGINEERING RESPONSIBILITIES

2.1 INCOG shall select a professional engineering firm and manage the contract with that firm to provide professional engineering services for the development of the Plans, Specifications and Estimates (PS&E) for this PROJECT. Design engineering for this PROJECT will be performed under the supervision of CITY. CITY warrants to INCOG that they will review the plans and will certify that the plans are acceptable to CITY and are in full compliance with current standards and specifications.

2.2 CITY shall process and defend at its own expense, all claims, demands, or suits brought against CITY arising from CITY's execution, performance, or failure to perform any of the provisions of this agreement. No party to this agreement shall be liable for the acts or omissions of the other party or for the failure to inspect or supervise the performance of the other party. Each party shall be responsible for the acts of its own employees. Notwithstanding anything herein to the contrary, neither INCOG nor CITY waive any rights or privileges in its favor under the laws of Oklahoma and the Governmental Tort Claims Act.

2.3 When any alleged act, omission, negligence, or misconduct may be subject to the limitations, exemptions, or defenses which may be raised under the Governmental Tort Claims Act, 51 O.S. Sec. 151, et seq., all such limitations, exemptions, and defenses shall be available to and may be asserted by CITY. No liability shall attach to INCOG or Federal Government except as expressly provided herein.

2.4 CITY agrees to the location of the subject PROJECT and agrees to adopt the final plans for said PROJECT as the official plans of CITY for the streets, boulevards, multi-use trails, and/or other improvements contained therein; and further, CITY affirmatively states that it has or shall fully and completely examine the plans and shall hereby warrant to INCOG, CITY's complete satisfaction with these plans and the fitness of the plans to construct aforesaid PROJECT.

2.5 CITY certifies that the PROJECT design plans shall comply, and the PROJECT when completed will comply, with the requirements of the Americans with Disabilities Act (ADA) of 1990 (42 U.S.C. §§ 12101 – 12213), 49 CFR Parts 27, 37 and 38 and 28 CFR parts 35 and 36. CITY shall be exclusively responsible for integrated ADA compliance planning for all CITY streets, sidewalks, multi-use trails and other facilities provided for public administration, use and accommodation, which is required of recipients and sub-recipients by 49 CFR § 27.11.

2.6 To the extent permitted by law, all data prepared under this Agreement shall be made available to INCOG and the Federal Government as described in 2 CFR §200.334,

Record Retention and Access, without restriction or limitation on their further use, with exception of any documents or information that would be considered attorney/client privileged by CITY.

2.7 Oklahoma Department of Transportation (ODOT) will conduct the environmental studies and prepare the National Environmental Protection Act (NEPA) documents as required for federally funded PROJECTs.

2.8 ODOT will forward the environmental documents to FHWA for approval. CITY and INCOG will provide documents to ODOT as required to prepare NEPA.

SECTION 3: LAND ACQUISITION AND UTILITY RELOCATION

3.1 CITY warrants to INCOG that, they have or will acquire all land, property, or rights-of-way needed for complete implementation of said PROJECT, free and clear of all obstructions and encumbrances and in full accordance with ODOT's guidelines for Right-of-Way Acquisition on Federal-Aid PROJECTs, the Uniform Relocation Act, the National Environmental Protection Act and all other applicable local, state and federal regulations.

3.2 CITY shall be responsible for ensuring all proper tax documentation is filed and issued to recipients of funds paid on behalf of CITY for Right-of-Way acquisition for this PROJECT.

3.3 CITY warrants to INCOG that it is knowledgeable of and will comply with the provisions of 42 U.S.C.A., Section 4601-4655 and 23 U.S.C.A., Section 323 (as amended) and 49 C.F.R. Part 24 in the acquisition of all right-of-way and the relocation of any displacees.

3.4 CITY shall remove, at its own expense, or cause the removal of, all encroachments on existing streets as shown on said plans, including all buildings, porches, fences, gasoline pumps, islands, and tanks, and any other such private installations and shall further remove or remediate any existing environmental contamination of soil and water from any source, known or unknown.

3.5 If the acquisition of right-of-way for this PROJECT causes the displacement of any person, business or non-profit organization, CITY warrants it will provide and be responsible for the Relocation Assistance Program and all costs associated with the Relocation Assistance Program. ODOT maintains a list of service providers who have been prequalified to administer the Relocation Assistance Program. CITY agrees to employ a service provider from the prequalified list provided by ODOT.

3.6 CITY warrants that any procurement, using federal funds, of property, goods or professional and personal services required for this PROJECT will be acquired by CITY

in compliance with the federal procurement Regulations at 40 USC 1101-1104 (Brooks Act) and the Regulations for Administration of Engineering and Design Related Service Contracts at 23 C.F.R. Part 172, as well as provisions of State purchasing laws applicable to CITY.

3.7 CITY will certify to INCOG prior to establishing a letting date that all existing utility facilities (if any) have been properly adjusted in full accordance with ODOT's Right-of-Way and Utilities Division policies and procedures to accommodate the construction of said PROJECT; and will be solely responsible for payment of any and all contractor expenses, claims, suits and/or judgments directly resultant from any actual utility relocation delays.

3.8 CITY agrees to;

- Transmit copies of the instruments, including all deeds and easements, to INCOG prior to the advertisement of bids for construction.
- Comply with the provisions of 42 U.S.C.A. § 4601-4655 and 23 U.S.C.A. § 323 (as amended) and, further comply with 49 C.F.R. Part 24 in the acquisition of all necessary right-of-way and relocation of all displacees.

SECTION 4: FUNDING SUMMARY

4.1 INCOG and CITY agree that the PROJECT will be financed at a **not-to-exceed**, INCOG RAISE estimated cost as described below:

Funding Table

		INCOG SS4A		CITY LOCAL	
DESCRIPTION	TOTAL ESTIMATED COST	SHARE %	AMOUNT	SHARE %	AMOUNT
Preliminary Engineering & NEPA	\$187,500	80%	\$150,000	20%	\$37,500
Final Design	\$368,750	80%	\$295,000	20%	\$73,750
Construction	\$4,443,750	80%	\$3,555,000	20%	\$888,750
TOTAL	\$5,000,000	TOTAL	\$4,000,000	TOTAL	\$1,000,000

4.2 Furthermore, INCOG and CITY agree that actual FHWA SAFE STREETS FOR ALL and INCOG EARMARKED costs incurred by PROJECT phases **FHWA Award No. 693JJ32440128** may exceed initial estimates. Costs between these PROJECT phases will be administratively adjusted based on actual cost of each phase, within the total cost

of this Agreement, without formal supplemental Agreement, in so far as the total PROJECT agreement is not exceeded.

4.3 City will provide \$37,500 to INCOG before March 31, 2024 for its share of Phase 1: Preliminary Engineering Services. City will provide \$73,750 to INCOG before January 31, 2025 for its share of Phase 2: Final Design. INCOG will return any unused funds to City within 180 days after completion of Phase 2: Final Design.

4.4 INCOG will reimburse CITY for 80% of actual construction expenses incurred and already paid by CITY as detailed on PROJECT invoices for construction, subject to total reimbursement not-to-exceed \$4,000,000 as shown in funding table. INCOG agrees to make arrangements for payment of any CITY invoices within 60 days subject to receipt of funds by INCOG from FHWA.

SECTION 5: CONSTRUCTION RESPONSIBILITIES

5.1 CITY agrees to comply with all applicable laws and regulations necessary to meet the Oklahoma Department of Environmental Quality (ODEQ) requirements for pollution prevention including discharges from storm water runoff during the planning and design of this PROJECT. Further, CITY agrees and stipulates as stated in the ODEQ's *General Permit OKR10*, dated September 13, 2017 or latest revision, to secure a storm water permit with the ODEQ for utility relocations, when required. It is also agreed that the storm water management plan for the PROJECT previously described in the document includes PROJECT plans and specifications, required schedules for accomplishing the temporary and permanent erosion control work, the site-specific storm water pollution prevention plan and the appropriate location map contained in the utility relocation plans, if applicable.

5.2 CITY's responsibility for environmental cleanup will be a continuing responsibility to remediate any and all known and unknown environmental damage throughout the duration of this agreement with INCOG in compliance with State and federal regulations.

5.3 The roadway and trail improvements and all devices specified herein shall not be altered, removed, or cease to be operative without mutual written consent of INCOG and CITY.

5.4 Upon approval of this agreement and the plans, specifications, and estimates by CITY, INCOG, and the FHWA, CITY will advertise and let the construction contract for this PROJECT in the usual and customary legal manner. It is agreed that the PROJECTs herein contemplated are proposed to be financed as previously described, and that this Agreement, all plans, specifications, estimate of costs, acceptance of work, payments, and procedure in general hereunder are subject in all things at all times to all local, state and federal laws, regulations, orders, approvals as may be applicable hereto.

5.5 CITY shall provide a copy of the executed construction contract to INCOG, upon receipt of a written request.

5.6 CITY will notify INCOG of pre-bid dates, bid opening dates, and award dates in writing upon receipt of a written request.

5.7 CITY agrees that prior to advertising of the PROJECT for bids (as to that part of the PROJECT lying within the present corporate limits) it will:

- Grant to INCOG and FHWA, and its contractors, the right-of-entry to all existing streets, alleys, and CITY owned property when required, and other rights-of-way shown on said plans.
- Remove at its own expense, or cause the removal of, all encroachments on existing streets, easements, and right-of-way as shown on said plans, including all signs, buildings, porches, awnings, porticos, fences, gasoline pumps and islands, and any other such private installations.
- Prohibit parking on that portion of the PROJECT within the corporate limits of CITY, except as may be indicated in the plans or hereafter approved by agreement with INCOG. CITY further agrees not to install, or permit to be installed, any signs, signals or markings not in conformance with the standards approved by the Federal Highway Administration and Manual on Uniform Traffic Control Devices (MUTCD).
- Maintain all right-of-way acquired for the construction of this PROJECT, as shown on said plans, in a manner consistent with applicable statutes, codes, ordinances and regulations of CITY and the State of Oklahoma.

5.8 CITY further agrees and warrants to INCOG that, subsequent to the construction of said PROJECT, CITY will:

- 1) Erect, maintain and operate traffic control devices, including signals, signs and pavement markings only in accordance with 47 O.S. 2011 §§ 15-104- 15-106, and subject to agreement of INCOG:
 - a) In the event that any traffic signal installed for the PROJECT is no longer needed for the purposes designated herein, then the traffic signal installed hereunder shall not be moved by CITY to any other point other than that which is approved by INCOG prior to such removal.

b) In the event there is no mutually agreed location for the reinstallation, CITY will assume complete ownership of the equipment following removal, if the installation is ten (10) years old or older. If the installation is less than ten (10) years old and:

1) In the event CITY desires total ownership of the equipment, CITY shall reimburse INCOG the original federal funding percentage share for the original equipment cost only, amortized for a ten (10) year service life, interest ignored, and assuming straight line depreciation.

2) In the event CITY does not desire total ownership of the equipment, CITY shall sell the equipment at public auction to the highest bidder. CITY shall reimburse INCOG the original federal funding percentage share of the proceeds of such sale.

2) Regulate and control traffic on said PROJECT, including but not limited to, the speed of vehicles, parking, stopping and turns only in accordance with 47 O.S. 2011 §§ 15-104- 15-106.

3) Maintain all drainage systems and facilities constructed, installed, modified or repaired in conjunction with this PROJECT or as may be otherwise necessary to ensure proper drainage for road surfaces constructed under the terms of this agreement.

4) Maintain all curbs and driveways abutting road surfaces constructed under the terms of this Agreement and all sidewalks adjacent thereto.

5) Maintain all right-of-way areas adjacent to road surfaces, including erosion control and periodic mowing of vegetation, in a manner consistent with applicable codes, ordinances and regulations.

5.9 CITY will appoint competent supervision and inspection of the construction work performed by the construction contractor and will provide such engineering, inspection and testing services as may be required to ensure that the construction of the PROJECT is accomplished in accordance with the approved Plans, Specifications and Estimates. CITY with INCOG's approval reserves the right to make such changes in said plans as is necessary for the proper construction of said PROJECT.

1) CITY agrees to provide such competent supervision as CITY deems necessary during times that the work is in progress to ensure the completion of the PROJECT to CITY's satisfaction and CITY's representatives and INCOG's representatives will cooperate fully to the end of obtaining work strictly in accordance with the plans and specifications.

- 2) CITY will make ample provisions annually for the proper maintenance of said PROJECT, including the provision of competent personnel and adequate equipment, specifically, to provide all required maintenance of the PROJECT during the critical period immediately following construction and to keep the facility in good and safe condition for the benefit of the traveling public.
- 3) CITY warrants to INCOG that it will periodically review the adequacy of the aforesaid PROJECT to ensure the safety of the traveling public and should CITY determine that further modifications or improvements be required, CITY shall take such actions as are necessary to make such modifications or improvements. When operation modifications are required which in the opinion of CITY exceed the capability of CITY's staff, CITY agrees to retain, at the sole expense of CITY, competent personnel for the purpose of bringing the improvement up to the proper standard of operation.
- 4) CITY warrants and agrees that upon completion of the aforesaid PROJECT, CITY assumes any and all financial obligations for the operation, use, and maintenance of the aforesaid PROJECT.

SECTION 6: NON-DISCRIMINATION CLAUSE

6.1 During the performance of this agreement, CITY, for itself, its assignees and successors in interest, agrees as follows:

1) **Compliance with Regulations:**

CITY shall comply with the regulations relative to nondiscrimination in federally-assisted programs of FHWA Title 49, Code of Federal Regulations, Part 21, as they may be amended from time to time (hereinafter referred to as the Regulations), which are herein incorporated by reference and made a part of this agreement.

2) **Nondiscrimination:**

CITY, with regard to the work performed by it during the agreement, shall not discriminate on the grounds of race, color, sex, age, national origin, disability/handicap, or income status, in the selection and retention of contractors or subcontractors, including procurements of materials and leases of equipment. CITY shall not participate either directly or indirectly, in the discrimination prohibited by Section 21.5 of the Regulations, including employment practices when the contract covers a program set forth in appendix B of the Regulations.

3) **Solicitations for Subcontracts, Including Procurement of Materials and Equipment:**

In all solicitations, either by competitive bidding or negotiation, made by CITY for work to be performed under a contract or subcontract, including procurements of materials or leases of equipment, each potential contractor or subcontractor or supplier shall be notified by CITY of CITY's obligations under this agreement and the Regulations relative to nondiscrimination on the grounds of race, color, sex, age, national origin, disability/handicap, or income status.

4) **Information and Reports:**

CITY shall provide all information and reports required by the Regulations, or directives issued pursuant thereto, and shall permit access to its books, records, accounts, other sources of information and its facilities as may be determined by INCOG or the FHWA to be pertinent to ascertain compliance with such Regulations or directives. Where any information required of a CITY is in the exclusive possession of another who fails or refuses to furnish this information, CITY shall so certify to INCOG, or the FHWA, as appropriate, and shall set forth what efforts it has made to obtain the information.

5) **Sanctions for Noncompliance:**

In the event of CITY's noncompliance with the nondiscrimination provisions of this agreement, INCOG shall impose such contract sanctions as it or the FHWA may determine to be appropriate, including but not limited to:

- a. Withholding of payments to CITY under the agreement until the CITY complies and/or
- b. Cancellation, termination, or suspension of the agreement in whole or in part.

6) **Incorporation of Provisions:**

CITY shall include the provisions of sub paragraphs 1) through 5) in every contract or subcontract, including procurements of materials and leases of equipment, unless exempt by the Regulations or directives issued pursuant thereto. CITY shall take such action with respect to any contract or subcontract or procurement as INCOG or the FHWA may direct as a means of enforcing such provisions, including sanctions for noncompliance.

SECTION 7: TERMINATION

7.1 This Agreement may be terminated by any of the following conditions:

- a) By mutual agreement and consent, in writing of both parties.

b) By INCOG by written notice to CITY as a consequence of failure by CITY to perform the services set forth herein in a satisfactory manner.

c) By either party, upon the failure of the other party to fulfill its obligations as set forth herein.

d) By INCOG should FHWA notify INCOG that federal aid funds cease to be available for PROJECT.

e) By satisfactory completion of all services and obligations described herein.

7.2 The termination of this Agreement shall extinguish all rights, duties, obligations and liabilities of INCOG and CITY under this agreement. If the potential termination of this Agreement is due to the failure of either INCOG or CITY to fulfill their obligation as set forth herein, the non-breaching party will notify the party alleged to be in breach that possible breach of agreement has occurred. The party alleged to be in breach should make a good faith effort to remedy that breach as outlined by non-breaching party within a period mutually agreed by each party.

SECTION 8: GOVERNING LAW AND VENUE

8.1 Any claims, disputes or litigation relating to the solicitation, execution, interpretation, performance, or enforcement of this Agreement shall be governed by the laws of the State of Oklahoma and the applicable rules, regulations, policies and procedures of INCOG's Board of Directors. Venue for any action, claim, dispute or litigation, mediation or arbitration shall be in Tulsa County, Oklahoma.

SECTION 9: DISPUTE RESOLUTION

9.1 The parties hereto have entered into this agreement in the State of Oklahoma and the laws of the State of Oklahoma shall apply. The parties agree to bargain in good faith in direct negotiation to achieve resolutions of any dispute and, if such efforts are unsuccessful, to retain a neutral mediation service to mediate the dispute prior to the filing of any court action. Mediation shall be conducted in the Tulsa Metropolitan area and the costs of such mediation shall be borne equally by the parties. If mediation is not successful, venue for any action brought to enforce the terms of this agreement shall be in Tulsa County, State of Oklahoma. Each party shall bear any cost and attorney fees incurred by the party in such litigation.

SECTION 10: PRIOR UNDERSTANDINGS

10.1 This agreement incorporates and reduces to writing all prior understandings, promises, agreements, commitments, covenants or conditions and constitutes the full and complete understanding and contractual relationship of the parties.

SECTION 11: AMENDMENTS OR MODIFICATIONS OF AGREEMENT

11.1 No changes, revisions, amendments or alterations in the manner, scope of type of work or compensation to be paid by INCOG shall be effective unless reduced to writing and executed by the parties with the same formalities as are observed in the execution of this Agreement.

SECTION 12: RECORDS

12.1 CITY is to maintain all books, documents, papers, accounting records and other evidence pertaining to costs incurred and to make such materials available at its respective offices at all reasonable times, during the agreement period and for three (3) years from the date of final payment under the agreement for inspection by INCOG and its Auditor and Inspector, and copies thereof shall be furnished to INCOG, if requested.

SECTION 13: HEADINGS

13.1 Article headings used in this Agreement are inserted for convenience of reference only and shall not be deemed a part of this agreement for any purpose.

SECTION 14: BINDING EFFECTS

14.1 This Agreement shall be binding upon and inure to the benefit of INCOG and CITY and shall be binding upon their successors and assigns subject to the limitations of Oklahoma law.

SECTION 15: SEVERABILITY

15.1 If any provision, clause or paragraph of this Agreement or any document incorporated by reference shall be determined invalid by a court of competent jurisdiction, such determination shall not affect the other provisions, clauses or paragraphs of this Agreement which are not affected by the determination. The provisions, clauses or paragraphs of this Agreement and any documents incorporated by reference are declared severable.

SECTION 16: EFFECTIVE DATE

16.1 This Agreement shall become effective on the date of execution by INCOG and CITY.

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IN WITNESS WHEREOF, the Executive Director of INCOG, pursuant to authority vested in him by the INCOG Board of Directors, has hereunto subscribed his name as Executive Director of INCOG and CITY has executed same pursuant to authority prescribed by law for CITY.

CITY, Broken Arrow on this 6 day of March, 2024,
and INCOG on the _____ day of _____, 20____.

CITY OF BROKEN ARROW

APPROVED AS TO FORM
AND LEGALITY

By: D. Graham Parker
Attorney

By: _____
Mayor

By: _____
Attest: Clerk

(SEAL): Approved – CITY OF BROKEN ARROW

INDIAN NATIONS COUNCIL OF GOVERNMENTS

By: _____
Executive Director DATE

By: _____
Attest: INCOG Attorney DATE