

ADVENTURE AFRICA PHASE II PROJECT AGREEMENT

This AGREEMENT is hereby entered into this ___ day of _____, 2018 by and between the Zoological Society of Milwaukee County, Inc., a Wisconsin not-for-profit corporation (Society) and Milwaukee County, represented by its Director of the Milwaukee County Zoo (County).

- A. In December 2013, the Milwaukee County Zoo and the Society completed a master plan that would guide redevelopment and development of the Zoo for the next 20 years. Adventure Africa was listed as the initial priority for implementation. In March 2009, the County, in association with the Society, agreed to begin design and construction of a Hippo Holding Building Project. In conjunction with that agreement, the Society, at its expense and in cooperation with Zoo staff, contracted with a consultant to design a full hippo exhibit with an underwater viewing feature. This project was included in the 2013 Zoo master plan as "Adventure Africa Phase II" (Project). The total estimated cost of the Project is \$13,435,936, which is expected to be expended in the County's 2019 fiscal year. In accordance with the terms and conditions set forth in this Agreement, the Society will contribute up to \$9,106,579 of the total cost of \$13,435,936 and the County will contribute \$4,329,357.
- B. Per Section 6(a)(3) of the 2014 Memorandum of Understanding between the County and the Society (2014 MOU), "[F]or each such capital project, the County and the Society will execute a specific agreement describing sources and uses of funds, procedures for transferring the Society's share of project costs to the County, program management, project schedule, County Architectural Services fees, and any other specific agreements. The Zoo Director will submit each agreement to the Committee on Parks, Energy and Environment for approval prior to bidding the project."
- C. The Project is subject to the approval of both the Society and County, and the following terms and conditions:

NOW THEREFORE, for good and valuable consideration, the parties agree that:

1. Design. The County, in consultation with the Society, will review the designs, plans, and specifications for the Project on or before March 1, 2019, and shall deliver same to the Society upon their completion.
2. Project Approval. The Project, including its cost, integration in the Zoo park siting, landscaping, design, equipment, plan, specifications and construction, shall be subject to the written approval of the Society and the County, which approval of the County shall include approval by the Department of Administrative Services-Facilities Management (DAS- FM). The Society's approval of the Project shall not be unreasonably conditioned, withheld, or delayed, and shall not constitute, nor shall be deemed to be, an approval of the Project's compliance with applicable governmental laws, ordinances, or rules.

3. Project Construction. Upon approval of the Project by the Society and the County, the County shall promptly begin, and shall have the sole responsibility for, the construction of the Project, which construction shall be done in accordance with matters previously approved in writing by and between the parties as contemplated by Section 2 above. The County shall provide contract documents to the Society, obtain bids, secure contracts, and administer the Project construction process through its completion. Any changes to those matters previously approved shall require the written approval of both the Society and the County. The County shall implement the Project with the intent that it will be completed and available for occupancy on or before May 1, 2020.

4. Source of Funds. Per Section 6(a)(4) of the 2014 MOU, “[N]o such capital project may proceed where the County will share the cost of such capital project until the County Board appropriates funds for such project and until the Society transfers its share of the appropriation or provides assurances acceptable to the County of the timely availability of such funds.” The total estimated cost for the Project is \$13,435,936. The County shall appropriate and authorize for expenditure during the County’s 2019 fiscal year the total approved Project budget. The County shall then provide a preliminary listing of Project expenses and commitments to the Society in the fourth quarter of the calendar year. After performing a reconciliation of Project expenses and confirming that they are consistent with the Project budget as previously approved, the County shall provide an accounting of Project expenses incurred along with a request for reimbursement of Project expenses incurred that is based on the proportional allocation established pursuant to in this Agreement and included in the 2019 County Budget. The Society shall reimburse the County for its proportionate share of the Project expenses incurred, up to a maximum aggregate reimbursement of \$9,106,579. The County shall pay up to a maximum amount of \$4,329,357 of the total cost of the Project. Notwithstanding the foregoing, upon written approval by the County and the Society, any cost overruns with regard to the Project shall be mutually agreed upon and the cost shared equally by the County and the Society. Except to the extent otherwise provided and approved by the County pursuant to Section 5 below, the Society shall provide to the County \$9,106,579 to be credited against the cost of the Project per the cash flow schedule noted in item "A" above. If the Audit Report required under Section 7 below indicates that, based on the due date, pledge receivables plus cash and investments held for the Project will not be sufficient to meet the Project cash flow schedule, the Society will be required to provide a reserve of available funds or line of credit that bridges the gap in receivables and cash flow, before construction can begin.

5. In-Kind Support. Upon the request by the Society, and upon written approval by the County, the Society may contract directly with third parties and provide materials, services, and/or equipment that is part of the Project. The request from the Society shall include an estimate of the fair market value of such materials, services and/or equipment to be provided. The request will be provided to the County Zoological Department Director, Department of Administrative Services – Performance, Strategy and Budget Director, and Comptroller before the County provides approval. Upon completion or delivery of in-kind materials, services and/or equipment delivery, the Society will provide a final accounting of the fair market value of the materials, services, and/or equipment and costs in writing to the County Zoological Department Director, Department of Administrative Services – Performance, Strategy and Budget Director, and Comptroller. The Project budget

will be adjusted to reflect the fair market value of the in-kind scope of work. In the event that the County agrees to accept such monies or materials, in-kind services, and/or equipment, the County shall account for these funds as part of the Society's \$9,106,579 commitment to the Project.

For each year of Project implementation, the Society will provide its prorated share of that year's incurred costs. The end result will be Society contributions and/or in-kind work that equals \$9,106,579 of the total Project costs.

6. Project Management. The Milwaukee County DAS-FM and the Society will select a Project Manager to coordinate the activities of the Project. It is agreed that the Project Manager will be William Banach, Project Architect. The scope of services to be provided by the Project Manager are described in Exhibit A attached to this Agreement. The cost of these services will not exceed 3.3% of the construction costs of the Project. The Project Manager, and such other personnel who are involved in the Project as the Society may reasonably request, shall meet with the Society periodically and as requested by the Society, and the Society is hereby granted access to the Project site for inspection and to all of the costs and records regarding the Project, including invoices and bills of material. The Project Manager shall have the authority to make on-site decisions during the course of construction, provided that such decisions do not materially change those matters (including design concepts and specifications) previously approved by the Society and the County. The utilization of contingency funds allocated to the Project budget shall be mutually agreed upon by the County and the Society.
7. Records. Per Section 8(b) of the 2014 MOU, “[t]he Society and the County shall provide each other access to all construction and other documents or records related to the construction of or disbursement of funds for capital improvement projects in which the Society participates. These documents and records shall include an accounting of the amount of funds received and disbursed by the Society and/or the County for a particular capital improvement project, but shall not include any documents which would contain information regarding individual donors or other sources of such funds.” It is the responsibility of the Society to verify to the County the validity of pledges and funds received by the Society for the Project. In satisfaction of this responsibility, the Society hereby agrees to engage its external auditor to prepare an audit report of all pledge receivables, cash, and investments, net of any outstanding payables or other commitments for such funds, held by the Society for the Project as of the Society’s September 30, 2018, fiscal year end (Audit Report). The Audit Report will be prepared based on the guidelines of the American Institute of CPAs for an “Auditor’s Report on a Specific Element” and will be delivered to the County no later than January 15, 2019. Upon delivery of the Audit Report, the Society will have no further responsibility to verify its pledges and funds for the Project.
8. Indemnification. The County and its contractors and agents hereby agree to indemnify and hold harmless the Society and its officers, directors and employees and their agents and assigns, from and against and with regard to costs, liabilities, demands, claims or damages arising out of or relating to the Project, and its construction, operation or maintenance. The County and Society further agree to indemnify each of each other in accordance with the terms contained in Section 12 of the 2014 MOU. Nothing in this Agreement shall be construed to constitute a

waiver of any otherwise applicable immunity, limited immunity or limitation on liability under Wisconsin law.

9. Insurance.

County Insurance. County is a municipal body corporate that self-funds for general liability under Wis. Stat. §§ 893.80 and 895.46(1), and automobile liability under § 345.05. County is also permissibly self-insured under Wis. Stat. § 102.28(2)(b) for Workers' Compensation. The protection is applicable to officers, employees and agents while acting within the scope of their employment or agency. Retentions and other costs of risk, including County contractual obligations, are financed under appropriation and fund accounting principles applicable to government operations.

Society Insurance. The Society agrees to maintain policies of insurance to cover costs as may arise from claims for damages to property of and/or claims which may arise out of or result from Society's activities, by whomever performed, in such coverage and amounts as required and approved by the County. Acceptable proof of such coverage shall be furnished to the County prior to commencement of activities under this Agreement. The Society shall provide evidence of the following coverages and minimum amounts: General Liability with limits of \$1,000,000 per occurrence/\$2,000,000 aggregate, Workers' Compensation Statutory limit, Employer's Liability with limit of \$100,000/\$500,000/\$100,000, Automobile Liability with a limit of \$1,000,000 per accident, and Umbrella Liability with limits of \$5,000,000 per occurrence/\$5,000,000 aggregate. Umbrella policy will follow form to underlying General, Employer's, and Automobile Liability policies. The County shall be named as an Additional insured on the General and Automobile policies as respects the services provided in the agreement. A Waiver of Subrogation shall be afforded to the County on the Worker's Compensation policy. The County acknowledges that the Society will not carry any Professional Liability coverage. A thirty (30) day written notice of cancellation or non-renewal shall be afforded to the County. The insurance specified above shall be placed with a carrier approved to do business in the State of Wisconsin. The Society has provided to the County the Certificate of Insurance attached hereto as Exhibit B, and the County hereby acknowledges that the carriers identified in such Certificate of Insurance are acceptable to the County. Any Carrier changes post agreement acceptance must be A rated or better per AM Best's Rating Guide or pre-approved by the County Risk Manager.

Third Party Insurance. The Society agrees to require any consultants, contractors, and subcontractors it engages to perform engineering and/or design work to carry Professional Liability coverage with limits of not less than \$2,000,000 per occurrence/\$2,000,000 aggregate.

10. Use of Facility and Naming Rights. The County shall be and remain the sole owner of the Project. The County agrees to maintain and staff such facility and make designated public space available for the use of the Society's members and general Zoo visitor public for the reasonable, useful life of the facility. In addition, the County and Society shall have reasonable access and use of the Project facility's designated public space without cost for events held or operated for the promotion of the Zoo or the Society. The County agrees that the Society is hereby granted the exclusive right to name the Project facility or parts thereof (by use of a single name

or multiple names), subject to the County's written approval, which shall not be unreasonably conditioned, withheld, or delayed, and upon such designation by the Society, the Zoo and County will thereafter, during the reasonable, useful life of the Project facility, refer in public to same by such name or names. The County will allow the Society to erect and maintain suitable name plates or other identifying signage that may be reasonably requested by the Society to effectuate such naming designation, and such costs are included in the Project budget. The County will execute such agreements as may be reasonably requested by the Society to confirm such naming rights.

11. Miscellaneous. This Agreement contains the entire understanding of the parties with regard to the subject matter described herein, and it may only be amended by a writing duly executed and approved by both parties.

12. No Private Business Use of the Project. The Society acknowledges that if the Project is financed with tax-exempt bonds, the County will be prohibited from using or permitting the use of the Project in a manner that would result in Private Business Use that would jeopardize the tax-exempt status of the interest on any tax-exempt obligations issued by the County to finance the County's portion of the Project (the "Bonds"). "Private Business Use" means direct or indirect use in a trade or business carried on by any person other than a state or local government unit (as defined in Section 1.103-1 of the Treasury Regulations) or where an organization described in Section 501(c)(3) of the Code is treated as a state or local government unit (as defined in Section 1.103-1 of the Treasury Regulations) with respect to its activities which are not unrelated trades or businesses (without regard to whether the activity results in unrelated trade or business income subject to taxation under Section 512(a) of the Code), determined under Section 513(a) of the Code. Without limiting the foregoing, the Society agrees and acknowledges that the Comptroller of the County may reject any contract proposed by the Society to be entered into with respect to the Project if the Comptroller determines, in his or her sole reasonable discretion, that such contract may result in Private Business Use of any portion of the Project (including contracts for naming rights contemplated in Section 10 herein). Further, the Society's use of the Project described in Section 10 herein may be limited by the Comptroller of the County in any year to ensure that any Bonds maintain their tax-exempt status. This provision shall remain in force as long as the County has Bonds outstanding. The Society shall provide the Comptroller with any proposed contract referred to above before entering into such contract and shall, promptly upon the County's written request delivered at any time until the last Bond matures, provide the Comptroller of the County on behalf of the County a certificate (and any other information the County reasonably deems necessary) to evidence that the Society complied with this Section.

IN WITNESS WHEREOF, the following officers and agents of the Society and County hereby affix their hand and seal effective as of the date above written.

ZOOLOGICAL SOCIETY OF
MILWAUKEE COUNTY, INC.

MILWAUKEE COUNTY

Jodi Gibson, President and CEO
Milwaukee County Zoo

Charles Wikenhauser, Director

Ray Wilson, Chairman Board of Directors

Approved with regards to County Ordinance Chapter 42:

By: _____ Date: _____
Community Business Development Partners

Reviewed by:

Approved for execution:

By: _____ Date: _____
Risk Management

By: _____ Date: _____
Corporation Counsel

Approved as to funds available
per sec. 59.255(2)(e), Stats.:

Approved:

By: _____ Date: _____
Comptroller

By: _____ Date: _____
County Executive

Approved as compliant under sec. 59.42(2)(b)5, Stats.:

By: _____ Date: _____
Corporation Counsel

EXHIBIT A

Scope of Services to be provided by the Project Manager

Conduct Formal Bid and Contract Award Process

1. Administration of competitive public bidding for all contracts over \$25,000 (formal bid w/ drawings, specs. & addenda)
2. Checking Bidder's Proof of Responsibility (maintenance of pre-qualification lists, distributions of bidding documents to pre-qualified contractors only)
3. Public Bidding (clerical, bid advertisement, printing of bidding drawings, specs. and addenda.)
4. Solicitation of Bids (Preparation of public advertisements, contacting possible bidders)
5. Bidding & Contract Documents (Review for compliance with project requirements)
6. Delivery of Bid & Contract Documents (Determining cost of bid sets, delivery of bid documents by mail, fax or in person)
7. Bid opening (Attendance at bid openings, checking for bid requirements compliance, return of non-responsive un-opened bids)
8. Bid Requirements, Disqualification & Rejection of bids (Checking bid bonds, performance, material and labor bonds bidder's certificate & lists of subcontractors)
9. Bid Rejection & Forfeiture (Verification with corporation counsel, preparation of rejection document, return of bid security.)
10. Bid Withdrawal, Correction and Contract Award (Review of computation sheets, TBE participation certificates, preparation of award document, funding review.)
11. Appeals (Review with corporation counsel, notices to involved parties, attendance at appeals hearings, administrative reviews.)
12. Corrections of errors in bids (return of incorrect bid unopened, review of computation sheets upon withdrawal)
13. Bidder's certificate/Subcontractors listing (checking subcontractor listing)

Administer Construction Contract

1. Settlement of dispute; defaults (determining compliance with the contract provisions regarding hours, wages, residence, classification of workers, etc.)
2. Estimates and release of funds (determination of value earned and appropriate retainage)
3. TBE Participation (Establishing levels of participation in professional services & construction contracts, monitoring compliance.)
4. Change Orders (Verification of funding available, solicitation of proposals, preparation & execution of change orders)
5. Escalator Clauses (Review of eligible material, equipment and labor increment on contracts lasting more than 6 months)
6. Partial Payment (Verify completion of work in question & value of same, check stored materials, determine value of incomplete work)
7. Penalties for late completion (Monitor causes for late completion of work, initiate claims when justified)
8. Transfer of Capital Improvement appropriations (Prepare transfer documents when appropriate)
9. Initiate contracts - issue NTP
10. Attend Pre-Construction Meeting
11. Review and approve contractors baseline schedule
12. Review and approve schedule of values

13. Review and approve submittal schedule, all submittals including Shop Dwgs., RFIs & CBs
14. Construction problem solving
15. Coordinate with Designer
16. Specification interpretation
17. Attend periodic construction meetings and report
18. Review and approve Substantial Completion date and form
19. Complete and process Project evaluation form
20. Approve and process contractor Payment Applications
21. Evaluate activity completion
22. Monitor TBE compliance
23. Monitor Payroll reports
24. Compose Change Orders and obtain required signatures
25. Solicit RFPs if needed
26. Evaluate submittals for both scope and cost
27. Review punch list
28. Monitor punch list for completion
29. Coordinate O&M training
30. Process Final Payment
31. Complete IPAC Form
32. Assemble files to Records Management
33. Ultimate contract management responsibility

EXHIBIT B

Certificate of Insurance