

**28E AGREEMENT FOR ROAD PAVING AND STORM WATER CONSTRUCTION
AT EAST OKOBOJI ACCESS – DICKINSON COUNTY, IOWA**

THIS AGREEMENT, between the state of Iowa, acting through the Iowa Department of Natural Resources (DNR), and Dickinson County (County) is duly authorized by and compliant with the requirements of Iowa Code Chapter 28E (2007).

W I T N E S S:

That the DNR manages the East Okoboji Access and a portion of Martin Drive and Beatty Boulevard, those portions deemed as State property by the State Attorney General's Office, which are located in Dickinson County;

That the County has contracted with Jacobson-Westergard and Associates of Estherville, Iowa, to provide the design services and construction engineering related to the Project as part of a larger community road and storm water rehabilitation project;

That the estimated construction costs for the DNR portion of the Project are \$149,448.50, as identified in Attachment A, attached hereto and incorporated by this reference;

That the estimated design costs for the DNR portion of the Project are \$11,805.00;

That DNR has the funds for the design and construction of the Project;

That the County has the resources necessary to manage and oversee the completion of the Project as part of its road reconstruction and storm water construction;

THEREFORE:

In consideration of mutual promises and covenants herein contained, the parties agree as follows:

Section 1. Purpose. The purpose of this Agreement is to describe the terms by which DNR will pay the County for the design and construction of the Project.

Section 2. Statutory Authority. This Agreement is made pursuant to statutory authority granted to the parties pursuant to 28E.12 (2007). This agreement is entered into under the authority of the Natural Resources Commission, as decided at its regular meeting on the 8th day of January 2009 (Dated Date), and as shown in the minutes thereof.

Section 3. Conditions.

A. The County shall:

1. Designate the main contact, responsible for the day-to-day management of this Agreement, as:

Dan Eckert, County Engineer
1802 Hill Avenue
Spirit Lake, IA 51360
Phone: (712)336-2944
Email: deckert@co.dickinson.ia.us

2. Design the Project, or cause the same to be designed by a professional engineer licensed according to Iowa Code 542B. During this design phase, the County shall:
 - a. Consult with the DNR to ensure the designed structure will meet the DNR's expectations;
 - b. Consult with the Iowa Department of Transportation (IDOT) during the design phase to ensure the design will meet IDOT's expectations and regulations regarding the structure itself and the funding.
 - c. Obtain approval of the design of the Project from both DNR and IDOT prior to construction. In the event any part of the Project's design is substantially modified, the County shall provide DNR an opportunity to approve or reject such design elements that may materially alter the Project.
3. Construct the Project, or cause the same to be constructed by use of a contractor. During the construction phase, the County shall:
 - a. Be primarily responsible for the complete and total construction of the Project in conformance with the approved design documents, including the administrative oversight of the contractors, the management of any construction contracts entered into pursuant to the Project, payments made to the contractors pursuant to those construction contracts, and the recording of progress with respect to the Project's construction. It shall be understood that the County shall furnish, or cause to be furnished, all labor, material, tools, transportation, and supplies required for all or any part of the Project to make each item complete in accordance with the spirit of the Agreement. It is understood that the apparent silence of the specifications as to any detail or the apparent omission of a detailed description concerning any point shall be regarded as meaning that only the best general practice is to prevail and that only materials and workmanship of the first quality are to be used.

- b. Manage, or caused to be managed, the Project's construction in a manner that manages and protects the natural resources in and around the Project site.
 - c. Consult with DNR regarding the construction schedule. The consultation should include a discussion of construction milestones and necessary inspections thereof on the part of the DNR.
 - d. As described in Section 15 of this Agreement, secure, or cause to be secured, all permits and reviews required for the construction, including sovereign lands construction permits, storm water permits, etc.
 - e. Include in any agreements with contractors that are required to construct the Project, provisions that :
 - i. Require DNR to inspect and approve designated milestones of the Project construction, as decided upon by the parties.
 - ii. Makes the DNR a third-party beneficiary with rights to enforce the obligations of the contractors with respect to the Project.
4. Schedule and conduct meetings to discuss matters related to this Agreement and any related construction contracts.
 5. Provide any request for DNR to be present for a site visit, meeting, inspection, or other activity that may be required under this Agreement, to the DNR Project Inspector at least two (2) business days prior to the date of such event.
 6. Provide final design documents to DNR within thirty (30) days of the Project's completion for DNR to have for its records and to use in and rely on for subsequent maintenance and/or repairs and for DNR's management of the area.
 7. Provide any design, bidding and construction documents to DNR immediately upon DNR's request.
 8. Require that its contractors and subcontractors hired to construction the Project file a certified statement on, showing the amount of Iowa sales tax and use tax paid by them on all materials which have become a component part of the finished, completed contract and on such supplies for this construction as were actually consumed on this work.
 9. Perform under this Agreement in an expeditious and professional manner.
 10. Take any and all precautions to protect the safety of the public at or near the Project site throughout the term of this Agreement.

11. Indemnify and hold harmless, and cause the same in any subcontracts it may enter into pursuant to this Agreement, the State of Iowa and DNR, its officers, employees and agents appointed and elected and volunteers from any and all costs, expenses, losses, claims, damages, liabilities, settlements and judgments, including reasonable value of the time spent by the Attorney General's Office, and the costs and expenses and reasonable attorneys' fees of other counsel required to defend the State of Iowa or DNR, related to or arising from: a breach of this Agreement; any negligent, intentional or wrongful act or omission of the County or any agent or subcontractor utilized or employed by the County; the County's performance or attempted performance of this Agreement or related agreements, including any agent or subcontractor utilized or employed by the County; and any failure by the County or its subcontractors to comply with the compliance with the Law provision of this Agreement.

B. DNR shall:

1. Designate the Project Inspector, responsible for the day-to-day management of this Agreement, as:

Don Labate
Wallace State Office Building
502 East Ninth Street
Des Moines, IA 50319
Phone: 515-250-3714
Email: Don.Labate@dnr.iowa.gov

The Project Inspector will decide all questions which may arise as to the quality and acceptability of materials furnished and work performed and as to the rate of progress of the Project's construction, all disputed and mutual rights between contractors, all plans and specifications, and all questions as to the acceptable fulfillment of this Agreement on the part of the County and its contractors.

2. Provide review and consultation to the County within a reasonable timeframe from when such review or consultation is reasonably requested by the County.

3. Inspect the Project as required by this Agreement, and provide approvals, disapprovals, and/or report of necessary repairs, modifications or fixes within two (2) business days.

C. The parties mutually agree:

1. In the event construction costs for the Project exceed estimates provided in Attachment A, which is incorporated by this reference, the County shall submit to DNR a change order including the change in time and cost estimated for such change order. If DNR accepts the estimate presented by

the County, the County shall perform, or cause to be performed, the modified services subject to the time and cost estimates included in the County's change order. The County's performance and the modified services shall be governed by the terms and conditions of this Agreement. The parties acknowledge that a change order for this Agreement may require approval of the Natural Resources Commission as required by its rules as 571 Iowa Administrative Code chapter 8.

2. DNR shall have the right to review and observe, at any time, completed work or work in progress. The County shall upon reasonable notice allow DNR, or anyone designated by DNR, to inspect its facilities and books and records relating to invoicing and time records to monitor and evaluate performance of this Agreement.
3. Unauthorized construction and construction done in excess of that provided by approved design documents or as given by the Project Inspector, or any work done without the authority of the Project Inspector when such authority is required, shall be considered as unauthorized and shall not be paid for. Unauthorized work may be ordered by DNR removed by and replaced at the County's expense.
4. DNR shall not be liable to pay for any portion of the Project's construction costs that may have been used to pay state or local taxes.

Section 4. Liability; Insurance. Nothing in this Agreement shall be construed to create joint or several liability of a party hereto for the acts, omissions or obligations of the other party. Pursuant to Iowa Code section 669, DNR and the State of Iowa are self-insured against all risks and hazards related to this Agreement. No separate fund has been established to provide self-insurance, and the State of Iowa is not obligated to establish any such fund during the term of this Agreement. The County shall require contractors it hires to construct the Project to carry general liability coverage in an amount that is commensurate in the construction industry for similar projects with DNR as a beneficiary on the policies.

Section 5. Duration. Termination. The term of this Agreement shall be from the Dated Date until the Project is completed or June 30, 2011, whichever occurs sooner.

Section 6. Termination. This Agreement may be terminated in the following manners:

- A. Mutual Agreement. By mutual agreement of the parties hereto, as evidenced in writing and according to Section 9 of this Agreement.
- B. Immediate Termination. DNR may terminate this Agreement for any of the following reasons effective immediately without advance notice: in the event the County is required to be certified or licensed as a condition precedent to providing services, the revocation or loss of such license or certification will result in immediate termination of the Agreement effective as of the date on which the license or certification is no longer in effect; or DNR determines that the actions, or failure to act, of the County,

its agents, employees or subcontractors have caused, or reasonably could cause, a client's life, health or safety to be jeopardized.

- C. Default. The occurrence of any one or more of the following events shall constitute cause for DNR to declare the County in default of its obligations under this Agreement: the County fails to perform, to DNR's satisfaction, any material requirement of this Agreement or is in violation of a material provision of this Agreement, including, but without limitation, the express warranties made by the County; DNR determines that satisfactory performance of this Agreement is substantially endangered or that a default is likely to occur; the County fails to make substantial and timely progress toward performance of the Agreement; the County has failed to comply with applicable federal, state and local laws, rules, ordinances, regulations and orders when performing within the scope of this Agreement; or the County has engaged in conduct that has or may expose the State or DNR to liability, as determined in DNR's sole discretion. If there is a default event caused by the County, DNR shall provide written notice to the County requesting that the breach or noncompliance be remedied within the period of time specified in DNR's written notice to the County.

If the breach or noncompliance is not remedied by the date of the written notice, DNR may either: immediately terminate the Agreement without additional written notice; or enforce the terms and conditions of the Agreement and seek any legal or equitable remedies.

- D. Lacks of Funds; Change in the Law. DNR shall have the right to terminate this Agreement without penalty by giving sixty (60) days' written notice to the County as a result of any of the following: adequate funds are not appropriated or granted to allow DNR to operate as required and to fulfill its obligations under this Agreement; funds are de-appropriated or not allocated or if funds needed by DNR, at the Department's sole discretion, are insufficient for any reason; DNR's authorization to operate is withdrawn or there is a material alteration in the programs administered by DNR; DNR's duties are substantially modified.
- E. Remedies of the County in Event of Termination by DNR. In the event of termination of this Agreement for any reason by DNR, DNR shall pay only those amounts, if any, due and owing to the County for services actually rendered up to and including the date of termination of the Agreement and for which DNR is obligated to pay pursuant to this Agreement. Payment will be made only upon submission of invoices and proper proof of the County's claim. This provision in no way limits the remedies available to DNR under this Agreement in the event of termination. However, DNR shall not be liable for any of the following costs: the payment of unemployment compensation to the County's employees; the payment of workers' compensation claims, which occur during the Agreement or extend beyond the date on which the Agreement terminates; any costs incurred by the County in its performance of the Agreement, including, but not limited to, startup costs, overhead or other costs associated with the performance of the Agreement; any taxes that may

be owed by the County in connection with the performance of this Agreement, including, but not limited to, sales taxes, excise taxes, use taxes, income taxes or property taxes.

- F. County's Termination Duties. The County upon receipt of notice of termination or upon request of DNR, shall: cease work under this Agreement and take all necessary or appropriate steps to limit disbursements and minimize costs, and furnish a report within thirty (30) days of the date of notice of termination, describing the status of all work under the Agreement, including, without limitation, results accomplished, and conclusions resulting there from, any other matters DNR may require; immediately cease using and return to DNR any personal property or materials, whether tangible or intangible, provided by DNR to the County; comply with DNR's instructions for the timely transfer of any active files and work product produced by the County under this Agreement; cooperate in good faith with DNR, its employees, agents and contractors during the transition period between the notification of termination and the substitution of any replacement County; immediately return to DNR any payments made by DNR for services that were not rendered by the County.

Section 7. No Separate Legal or Administrative Entity; Administration. By this Agreement the parties do not intend to create a separate legal or administrative entity.

Section 8. Governing Law. This Agreement shall be governed by, construed and enforced in accordance with the laws of the State of Iowa. Nothing herein shall be construed to relieve any party of any obligation or responsibility imposed upon it by law.

Section 9. Amendments. This Agreement may not be changed except by an amendment hereto in writing signed by the parties hereto. If this Agreement is amended, any amendment thereto shall be recorded consistent with the requirements of Iowa Code Chapter 28E (2007) and Section 10 of this Agreement.

Section 10. Recording. Upon execution the DNR shall file a copy of this Agreement with the Iowa Secretary of State, as required by Iowa Code Section 28E.8 (2007).

Section 11. Approval; Authorization. By their signatures below, the representatives of the respective parties confirm that this Agreement has been approved and its execution authorized by the respective duly authorized officers or governing bodies of the parties.

Section 12. Payments. DNR shall pay the County for actual project costs in an amount not to exceed \$178,000.00 for performance of this Agreement. These costs shall reflect the costs of design and construction engineering, which are 7.9% of the bid total for the DNR related work, plus the estimated costs of construction, as identified in Attachment A. DNR shall pay the county for actual project costs only; as such, the County shall provide DNR with itemized invoices demonstrating project costs.

The County shall submit one invoice to the DNR upon completion of the Project. The invoice shall comply with all applicable rules concerning payment of such claims. DNR shall pay all approved invoices in arrears and in conformance with Iowa Code section 8A.514 (2007). DNR may pay in less than sixty (60) days, as provided in Iowa Code section 8A.514. However, an election to pay in less than sixty (60) days shall not act as an implied waiver of Iowa Code section 8A.514. Unless otherwise agreed in writing by the parties, the County shall not be entitled to receive any other payment or compensation from the State for any goods or services provided by or on behalf of the County under this Agreement. The County shall be solely responsible for paying all costs, expenses and charges it incurs in connection with its performance under this Agreement.

Section 13. Books and Records. The County shall maintain books, records and documents which sufficiently and properly document and calculate all charges billed to DNR throughout the term of this Agreement for a period of at least five (5) years following the date of final payment or completion of any required audit, whichever is later. Records to be maintained include both financial records and service records. The County shall permit the Auditor of the State of Iowa or any authorized representative of the State and where federal funds are involved, the Comptroller General of the United States or any other authorized representative of the United States government, to access and examine, audit, excerpt and transcribe any directly pertinent books, documents, papers, electronic or optically stored and created records or other records of the County relating to orders, invoices or payments or any other documentation or materials pertaining to this Agreement, wherever such records may be located. The County shall not impose a charge for audit or examination of the County's books and records.

Section 14. Notice. Any and all notices, designations, consents, offers, acceptances or any other communication provided for herein shall be given in writing by registered or certified mail, return receipt requested, by receipted hand delivery, by Federal Express, courier or other similar and reliable carrier which shall be addressed to the executive officer of each party to this Agreement.

Section 15. Compliance With Laws. The County, its employees, agents, and subcontractors shall comply with all applicable federal, state, and local laws, rules, ordinances, regulations and orders when performing the services under this Agreement, including without limitation, all laws applicable to the prevention of discrimination in employment and the use of targeted small businesses as subcontractors or suppliers. The County, its employees, agents and subcontractors shall also comply with all federal, state and local laws regarding business permits and licenses that may be required to carry out the work performed under this Agreement.

Section 16. Federal Requirements. The Department may use federal funds to pay for some or all of its obligations pursuant to this Agreement. As such, the County agrees to be bound to the provisions of Attachments C and D, attached and incorporated by this reference, as they bind the "Contractor."

Section 17. Order of Priority. In the event of a conflict between the Agreement, and the Attachments, the conflict shall be resolved according to the following priority, ranked in descending order: (1) the Agreement; (2) Attachment A; (3) Attachment C; (4) Attachment D.

IN WITNESS WHEREOF, the parties have caused this Agreement to be signed on their behalf by their duly authorized officers all as of the Dated Date.

IOWA DEPARTMENT OF NATURAL RESOURCES

BY: _____
Richard Leopold
Director

STATE OF IOWA, POLK COUNTY: This instrument was acknowledged before me on the _____ day of _____, 2009, by Richard Leopold as the Director of the Iowa Department of Natural Resources.

NOTARY PUBLIC FOR THE STATE OF IOWA

DICKINSON COUNTY, IOWA

BY: _____
Name: _____
Title: _____

STATE OF IOWA, DICKINSON COUNTY: This instrument was acknowledged before me on the _____ day of _____, 2009, by _____ as _____ of Dickinson County, Iowa.

NOTARY PUBLIC FOR THE STATE OF IOWA

Attachment C

Equal Employment Opportunity.

The Contractor agrees to the following:

C.1 The Contractor shall not discriminate against any employee or applicant for employment because of race, creed, color, religion, sex, national origin, age, or mental or physical disability. The Contractor shall take affirmative action to ensure that applicants are employed and that employees are treated, during employment, without regard to their race, creed, color, religion, sex, national origin, age or mental or physical disability except where mental or physical disability relates to a bona fide occupational qualification reasonably necessary to the normal operation of the Contractor's business. Such action shall include but not be limited to, the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation and selection for training, including apprenticeship. The Contractor agrees to post notices, setting forth provisions of this nondiscrimination clause, in conspicuous places available to employees and applicants for employment.

C.2 The Contractor shall in all solicitations or advertisements for employees, placed by or on behalf of the Contractor, state that all qualified applicants shall receive consideration for employment without regard to race, creed, color, religion, sex, national origin, age, or mental or physical disability except where mental or physical disability is a bona fide occupation qualification reasonably necessary to the normal operation of the Contractor's business.

C.3 The Contractor shall comply with all relevant provisions of the Iowa Civil Rights Act of 1965, as amended, Iowa Executive Order 15 or 1973, Chapter 19B, Code of Iowa, Federal Executive Order 11246 of 1965, as amended by Federal Executive Order 11376 of 1967, and Title VI of the Civil Rights Act of 1964, as amended. The Contractor shall furnish all information and reports requested by the state of Iowa or required by, or pursuant to, the rules and regulations thereof and shall permit access to payroll and employment records by the state of Iowa for purposes of investigation to ascertain compliance with such rules, regulations or requests, or with this nondiscrimination clause.

C.4 In the event of the Contractor's noncompliance with the nondiscrimination clauses of this contract or with any of the aforesaid rules, regulations or requests, this contract may be canceled, terminated or suspended in whole or in part. In addition, the state of Iowa may take such further action, and such other sanctions may be imposed and remedies invoked, as provided by the Iowa Civil Rights Act of 1965, as amended, Chapter 216, Code of Iowa, or as otherwise provided by law.

C.5 The Contractor shall include the provisions of this attachment in every subcontract, unless specifically exempted by approval of the state of Iowa, so that such provisions shall be binding on each subcontract. The Contractor shall take such action with respect to any subcontract as the state of Iowa may direct as a means of enforcing such provisions, including sanctions for noncompliance; provided, however, that in the event the Contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the state of Iowa, the Contractor may request the state of Iowa to enter into such litigation to protect the interests of the state of Iowa.

Attachment D

Additional Requirements for Federally-funded Agreements

D.1 Suspension and Debarment. The Contractor certifies pursuant to 31 CFR Part 19 that neither it nor its principles are presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this Contract by any federal department or agency.

D.2 Lobbying Restrictions. The Contractor shall comply with all certification and disclosure requirements prescribed by 31 U.S.C. Section 1352 and any implementing regulations and shall be responsible for ensuring that any subcontractor fully complies with all certification and disclosure requirements.

D.3 Pro-Children Act of 1994. Public Law 103-227, also known as the Pro-Children Act of 1994 (Act), requires that smoking not be permitted in any portion of any indoor facility owned or leased or contracted for by an entity and used routinely or regularly for the provision of health, day care, early childhood development services, education or library services to children under the age of 18, if the services are funded by federal programs either directly or through state or local governments, by federal grant, contract, loan or loan guarantee. Federal programs include grants, cooperative agreements, loans or loan guarantees and contracts. The law also applies to children's services that are provided in indoor facilities that are constructed, operated or maintained with such federal funds. The law does not apply to children's services provided in private residences; portions of facilities used for inpatient drug or alcohol treatment; service providers whose sole source of applicable federal funds is Medicare or Medicaid; or facilities (other than clinics) where WIC coupons are redeemed. Failure to comply with the provisions of the law may result in the imposition of a civil monetary penalty of up to \$1,000 for each violation and/or the imposition of an administrative compliance order on the responsible party. The Contractor certifies that it and its subcontractors will comply with the requirements of the Pro-Children Act of 1994 and will not allow smoking within any portion of any indoor facility used for the provision of services for children as defined by the Act.

D.4 Certified Audits. Local governments and non-profit subrecipient entities that expend \$500,000 or more in a year in federal awards (from all sources) shall have a single audit conducted for that year in accordance with the provisions of OMB Circular A-133 "Audit of States, Local Governments, and Non-Profit Organizations." A copy of the final audit report shall be submitted to the Department if either the schedule of findings and questioned costs or the summary schedule of prior audit findings includes any audit findings related to federal awards provided by the Department. If an audit report is not required to be submitted per the criteria above, the subrecipient must provide written notification to the Department that the audit was conducted in accordance with Government Auditing Standards and that neither the schedule of findings and questioned costs nor the summary schedule of prior audit findings includes any audit findings related to federal awards provided by the Department. See A-133 Section 21 for a discussion of subrecipient versus vendor relationships and for applicability of these audit requirements.

D.5 Drug Free Work Place. The Contractor shall provide a drug free workplace in accordance with the Drug Free Workplace Act of 1988 and all applicable regulations.