

PUBLIC WORKS & UTILITIES COMMITTEE

13-0189R

RESOLUTION AUTHORIZING A FIVE YEAR MASTER SERVICES AGREEMENT WITH MINNESOTA POWER FOR EMERGENCY REPAIR SERVICES.

CITY PROPOSAL:

RESOLVED, that the proper city officials are hereby authorized to execute an agreement, substantially in the form of that on file in the office of the city clerk as Public Document No. _____, with Minnesota Power for emergency repair services, payable from the fund of the department in which the service is needed.

Approved:


Department Director

Approved for presentation to council:


Chief Administrative Officer

Approved as to form:


Attorney

Approved:


Auditor

FAC JM:tmp 04/11/2013

STATEMENT OF PURPOSE: This resolution authorizes an agreement with Minnesota Power for emergency repair services of city-owned electrical infrastructure. Minnesota Power's services will be utilized on an as-needed basis when projects involve voltage exceeding the licensed capabilities of the city's internal electricians. Within the past two years, this service has been utilized once, and the average cost over the past five years has been \$5,000.

The city of Duluth has previously had this ongoing arrangement with Minnesota Power; however, Minnesota Power has requested this agreement for services to formalize the arrangement. The scope of services requested will be detailed in a Scope of Work specific to each individual project as it arises. The agreement can be terminated by either party upon 30 days written notice.

MASTER SERVICES AGREEMENT

THIS AGREEMENT, made this ____ day of _____, 2013, between the City of Duluth, Minnesota, a (“Customer”), and Minnesota Power, an operating division of ALLETE, Inc., a Minnesota corporation, hereinafter called “Company”, such parties being hereinafter referred to individually as “Party” and collectively as “Parties”:

WITNESSETH:

WHEREAS, Customer and Company desire to enter into a Master Services Agreement to set forth the terms and conditions that shall apply to Company’s provision of service as described in greater detail below.

NOW THEREFORE, in consideration of these promises and of the mutual agreements hereinafter contained, the Parties hereto agree as follows:

1. Scope of Work.

(a) From time to time, Customer may request that Company perform repair, service, testing, engineering, safety training, maintenance, emergency services or other Work for Customer. This Agreement does not obligate Customer to request services from Company, nor does it obligate Company to accept orders for work. In the event Customer requests and Company agrees to perform Work, the Parties shall agree upon a Scope of Work that shall govern all Work performed by Company on behalf of Customer during the term of this Agreement. “Work” shall include all equipment, training and information, supplies, materials, labor and any other services furnished by Company, whether supplied directly by Company or through its subcontractors or agents. Company shall advise Customer of such Work it agrees to provide (hereinafter the “Scope of Work”) in the form of an exhibit to schedule including an estimate of amount of hours required to perform the Work, the hourly rate(s) charged for the Work and any equipment or parts needed to perform the Work. Each Scope of Work Exhibit shall be made part hereof and incorporated herein by this reference. In the case of a conflict between the terms and conditions of this Agreement and the terms and conditions in any purchase order or Scope of Work, and in the case in which a fully-executed Purchase Order or Scope of Work does not exist, the terms and conditions of this Agreement shall govern.

(b) Access. Customer acknowledges that inspection, preventive maintenance and any scheduled work is dependent upon Customer providing Company access as scheduled. In the event of non-scheduled or emergency work, Customer will provide Company access as soon a reasonably possible after notification of such non-schedule or emergency work.

(c) Change Orders. Customer may, by written change order accepted by Company, make changes to the Work to be performed pursuant to a specific Scope of Work. If any such change results in an increase or decrease in the cost or time required for performance of the Work, there shall be an equitable adjustment to the Scope of Work.

Company shall not be obligated to proceed with the changed or extra Work until the price and time of performance of the same has been agreed upon in writing.

2. Scheduling Work.

(a) Company will schedule Work and will attempt to notify Customer of such schedule in advance. Work requiring service interruption will be scheduled in advance, if possible, with Customer's office listed at Schedule 26 attached to this Agreement or other designated location. Company and Customer shall make a good faith effort to minimize the amount and duration of any required service interruptions.

(b) Unplanned work, generally relating to an electrical outage, will normally be prioritized and addressed with the objective of getting the largest number of customers back in service first for Minnesota Power's system as a whole. Customer acknowledges and understands that Minnesota Power's ability to handle any specific Customer outage may be compromised by the proximity of craft works to the location of electrical switches, line materials, coincidental electrical faults as well as the finding of the fault on the circuit serving the Customer and other factors outside the control of Minnesota Power.

(c) To the extent reasonably possible, the performance of Work which affects the operation of the Customer's facilities shall be scheduled to be performed only at times acceptable to the Customer. Except for emergency or unplanned Work, in the event it is necessary to either interrupt the power supply or to impose abnormal operating conditions on the Customer's facilities, Customer shall be notified in advance and an agreement must be reached as to the time scheduled for such operation.

(d) If any part of Company's Work is dependent upon the quality and completeness of work performed under another contract at the same time or after the Company's Work which is not performed by a subcontractor or agent of Company, Company shall not be responsible if the work performed under the other contract is defective or unsuitable and such condition affects the timing, scheduling or quality of the Work performed by Company hereunder.

3. Independent Contractor. Customer agrees that Company is performing this Agreement as an independent contractor. Customer agrees that Company is solely responsible for supervision and direction of the Work performed under this Agreement by Company's employees, but that it is not responsible for work performed by the Customer or any employee, agent, or subcontractor of the Customer. Company acknowledges that it serves as sole employer with respect to any of the employees employed by it for performance of such work, and is responsible for the methods and manner of such work performed under this Agreement. Under no circumstances does work performed under this Agreement create any partnership, joint venture or agency relationship between the Customer and Company. By entering into this Agreement there shall be no merger of the parties' systems or facilities.

4. **Inspection and Acceptance of Work.** The Customer may, in a timely fashion, cause portions of the Work to be inspected. Company shall furnish all reasonable assistance required for the proper inspection of the Work. Work which has been inspected and approved by Customer's inspectors shall thereafter be considered accepted by the Customer. When finished Work is dismantled for the purpose of inspection, Customer shall pay the cost incident thereto.
5. **Suspension of Work.** The Customer reserves the right to suspend and reinstate execution of the whole or any part of the Work without invalidating the provisions of the Agreement. The Customer will issue orders for suspension or reinstatement of Work in writing to Company. Any direct costs and expenses incurred by Company which are caused by Work suspensions ordered by the Customer will be paid by the Customer to Company.
6. **Labor Relations Information.** Both Parties shall give each other prompt written notice of any labor dispute which may reasonably be expected to affect performance of the work under this Agreement by Company or the final cost of such work. In the event of a labor dispute which threatens to adversely affect the progress or cost of the work hereunder, Company reserves the right not to begin, to suspend or to discontinue the work.
7. **Review of Proposed Work.** Company will inform the Customer in advance as to Company's plans for carrying out any part of the Work. If such a plan is presented, Customer shall, within ten (10) business days of receipt thereof, either approve or reject the plan. In the event that Customer rejects a plan presented hereunder, Company may, in its sole discretion, terminate the Scope of Work to which such plan relates and Company shall have no further obligation under such Scope of Work.
8. **Compensation.**
 - (a) Customer shall compensate Company for the Work as provided herein. Unless otherwise provided in a Scope of Work and/or Schedule 8 attached to this Agreement, Company's actual costs for labor, services, and equipment time plus 30% will be the rate charged the Customer.
9. **Billing and Payment** Company will bill Customer for the work described in the associated Scope of Work. Customer shall make payment within thirty (30) days after receipt of an invoice for any undisputed Work performed hereunder. Customer shall have no rights of setoff whatsoever (including, without limitation, setoff under other contract with Company or its affiliates, including but not limited to any electric service agreement in effect at the time.)

If Customer fails to fulfill any of the payment conditions of this Agreement, Company may suspend performance of the Work after Company has provided Customer with notice and reasonable time (not to exceed five (5) business days) to cure the payment failure.

10. **Term.** Unless earlier terminated by either Party upon 30 (thirty) days written notice, the term of this Agreement shall be for one (1) five (5) year term from the date hereof. Termination shall not relieve Customer from its obligation to compensate Company for undisputed work performed and materials supplied prior to such termination date and for all non-cancelable orders for material ordered but not yet delivered by the termination date. In the events such materials are used by Company for Work performed for another customer, Company shall refund Customer the amount paid for such materials.
11. **Administrative Approval.** This Agreement is subject to the approval or acceptance of any regulatory body having jurisdiction thereof.
12. **Assignment and Subcontracting.** This Agreement shall be binding upon the parties hereto and their respective successors and assigns. However, neither Party may assign or transfer its interest or obligations under this Agreement without the prior written consent of the other Party, which shall not be unreasonably withheld. Provided, however, that the preceding shall not restrict Company's ability to delegate all or part of the work to subcontractors. Company shall be responsible for all actions and/or inactions of its subcontractors.
13. **Claims and Actions.** Each party will be responsible for its own acts and behavior and the results thereof. If any claim or cause of action is asserted against a party in connection with the performance of this Agreement, that party will promptly notify the other party of the claim or cause of action. The parties will reasonably cooperate with each other in the defense of claims and causes of action arising out of the performance of this Agreement. The liability of the City is limited to the extent set forth in Minnesota Statutes Chapter 466.

In addition to the foregoing, if utility equipment inspection and maintenance is provided: Customer acknowledges that utility equipment malfunction or failure may occur notwithstanding the inspection, maintenance and repair work performed hereunder. The provisions of this Paragraph 12 shall survive termination, cancellation or expiration of this Agreement and shall apply, notwithstanding any other provisions of this Agreement to the fullest extent permitted by law.

14. **Company Warranties.** Company shall perform its work hereunder according to standard and prudent utility industry practices and procedures. THIS WARRANTY IS EXCLUSIVE AND IS GIVEN IN LIEU OF ALL OTHER WARRANTIES WHETHER STATUTORY, EXPRESS OR IMPLIED (INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NONINFRINGEMENT OF THIRD PARTY INTELLECTUAL PROPERTY RIGHTS, OR ANY WARRANTY ARISING FROM A COURSE OF DEALING, USAGE, OR TRADE PRACTICE).
15. **Customer's Warranties.** Customer warrants and represents to Company that the information it supplies to Company upon which Work may be based is true and correct to

the best of Customer's knowledge. Customer agrees that in the event that any Work requires Company to make a new design to meet Customer's specifications, any ideas or inventions relating to the subject matter of such Work, or as a direct or indirect result of such Work, shall be the property of Company and Customer agrees without compensation, to cooperate in taking all reasonable steps necessary to vest title in such inventions in Company.

- 16. Insurance.** Both Parties agree and are required to purchase and maintain insurance in the form of Workers Compensation and Employers Liability, Commercial General Liability and Automobile Liability covering each Party's operations associated with the Work, and Property insurance covering their respective real and personal property interests at or near locations where Work will be performed. Types and amounts of required coverages are specified in Schedule 17 of this Agreement. In the event a particular Scope of Work may require specialized or higher coverage limits, upon agreement of the Parties one or both Parties shall also purchase and maintain additional insurance in the form of Excess or Umbrella Liability, Environmental Liability and/or Professional Liability of the types and amounts indicated in Schedule 17. If requested, each Party will provide to the other certificates of insurance evidencing the insurance required by this Agreement before any Work commences. If policies for which certificates have previously been provided expire during the course of this Agreement or any renewals hereof, certificates evidencing renewal of such policies shall immediately be provided upon renewal. Each Party shall instruct its insurance representative to notify the other Party should any of the policies be cancelled before the expiration date thereof, notice will be delivered in accordance with the policy provisions. Company shall be permitted to self-insure its insurance obligations herein. Company acknowledges that Customer's tort liability exposure is subject to the limitations established in Minn. Stat. Sections 466.01 - 466.15.

Any certificates shall provide that the policies shall not be changed or canceled during the life of this Agreement without at least thirty (30) days' advanced notice being given to Customer. Failure to give such notice to Customer shall render any such change or changes in said policy or coverages ineffective as against City.

The Customer reserves the right to request Company to increase the coverages set forth above and to provide evidence of such increased insurance to the extent that the liability limits as provided in Minn.Stat. Sec. 466.04 are increased.

Customer represents that it is self-insured with regard to comprehensive liability and property damage claims with a combined single limit of \$1,500,000 which are set forth within Minnesota Statute 466. The Customer also represents that it is self-insured with regard to Workers' Compensation claims. There are no certificates that are issued for self-insured Workers' Compensation and General Liability insurance.

- 17. Waiver of Subrogation.** The Parties hereby release each other and their respective employees, officers, directors, and agents from any claims for injury to any person or damage to property that are caused by or result from risks insured against by the insurance required to be carried by this Agreement. Each Party to the extent possible shall obtain, for each policy of insurance, provisions permitting waiver of any claim against the other Party for loss or damage within the scope of the insurance and each Party to the extent permitted, for itself and its insurer, waives all such insured claims against the other Party.
- 18. Limitation on Liability.** Company will not be liable to Customer, whether in contract, in tort (including negligence and strict liability) under any warranty, or otherwise for loss of or damage to Customer's equipment or facilities, loss of use of equipment or power system, interruption or disturbance of service, for any cause other than gross negligence or willful misconduct. Company will not be liable for Customer's cost of capital, loss of profits or revenues or the loss of use thereof, claims of customers of Customer, or for any special, indirect, incidental or consequential loss or damage whatsoever. The total cumulative liability of Company under each Scope of Work and of this Agreement (except for third party claims for personal injury) shall not exceed the greater of amount paid by Customer for the Work performed under such Scope of Work or the insurance limits set forth in Schedule 17.
- 19. Taxes, Permits and Licenses.** Unless otherwise specified in this Agreement, Customer shall pay all sales, use and other taxes (not including income taxes) that are lawfully assessed against Customer or Company in connection with the Work and shall obtain and pay for all licenses, permits and inspections required for the Work. The foregoing does not include professional licenses held by Company's employees or contractors providing services.
- 20. Unanticipated Hazardous Substances.** It is possible that Customer's equipment may contain hazardous substances including, but not limited to, asbestos, lead and PCBs. If such hazardous substances are encountered during performance of any work, Company will make all required state or federal notifications and shall notify Customer immediately and may suspend the work until the situation has been remedied to Company's satisfaction. Whenever possible, Company will use best efforts to mitigate the possible exposure of hazardous substances. Unless otherwise agreed, Company shall have no further responsibility as to such hazardous substances.
- 21. Events Outside Company's Control.** Company shall not be responsible for delays or failures in the performance of any Work resulting from: (i) any act or neglect of the Customer or any employee, agent or subcontractor of Customer, (ii) any act or neglect of any other contractor employed by the Customer, (iii) a labor dispute (except labor disputes involving Company's employees), (iv) fires, severe weather conditions, floods, war (declared or undeclared), or epidemics or (v) any other cause outside the control of Company.

22. **Surviving Obligations.** Termination, cancellation or expiration of this Agreement (i) shall not relieve Customer of its obligations with respect to its payment obligations under Article 8, (ii) shall not relieve either Party of any obligations under Article 12, (iii) shall not relieve either party of its obligations under Articles 15 and 16, and (iv) shall not be deemed to terminate the limitation on liability under Article 17.
23. **Severability.** In the event that any provision of this Agreement is determined to be unlawful or unenforceable, this Agreement shall continue in full force and effect between the Parties, except for the provision determined to be unlawful or unenforceable.
24. **Waiver.** No provision of this Agreement can be waived except by a written instrument signed by the Party waiving such provision, nor shall failure to object to any breach of a provision of this Agreement waive the right to object to a subsequent breach of the same or any other provision.
25. **Notices.** Any notices, demands or requests, required or authorized by this Agreement, will be deemed properly given if personal delivery, Registered or Certified Mail or nationally recognized overnight courier as set forth in Schedule 26 attached to this Agreement. The designation of the persons to be notified or the address of such persons may be changed at any time by similar notice.
26. **Captions.** The captions contained in this agreement are for convenience and reference only and in no way define, describe, extend or limit the scope of intent in this Agreement or the intent of any provision herein.
27. **Governing Laws.** This Agreement shall be governed by the laws of the State of Minnesota, exclusive of its choice of laws provisions. The Parties agree to submit to the exclusive jurisdiction of the State and Federal Courts of competent jurisdiction in the State of Minnesota, and waive any objections to such courts based on jurisdiction, venue or inconvenient forum.
28. **Previous Agreements.** This Agreement and the exhibits hereto, supersede and replace all previous agreements addressing services at the Customer's facilities and no modification, amendment, rescission, waiver of other change shall be binding on either Party unless assented to in writing. Any oral or written representation, warranty, course of dealing or trade usage not contained or referenced herein shall not be binding on either Party.

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed as of the day and year first written above.

CITY OF DULUTH

MINNESOTA POWER

By _____
Its Mayor

By _____

Its _____
Title of Representative

Attest

Date _____

By _____
City Clerk

Date _____

Countersigned:

City Auditor

Approved as to form:

City Attorney

Schedule 1
Scope of Work

Schedule 8
 Compensation:
 Minnesota Power Schedule of Rates for Services

2012 FSO Rates
 February 1, 2012 - January 31, 2013

	Labor			*Vehicle		
	Regular Time Rate	1.5 Time Rate	Double Time Rate	Regular Time Rate	1.5 Time Rate	Double Time Rate
Large Crew Leader	\$75.39	\$68.51	\$91.35	\$30.16	\$27.40	\$36.54
Training Crew Sub Foreman	\$75.39	\$68.51	\$91.35	\$30.16	\$27.40	\$36.54
Lead Cable Splicer	\$71.98	\$65.42	\$87.22	\$28.79	\$26.17	\$34.89
Lead Lineworker	\$71.98	\$65.42	\$87.22	\$28.79	\$26.17	\$34.89
Sr Relay & Meter Technician	\$71.98	\$65.42	\$87.22	\$28.79	\$26.17	\$34.89
Troubleman	\$70.01	\$63.63	\$84.84	\$28.00	\$25.45	\$33.94
Lead Laboratory Technician	\$69.17	\$62.86	\$83.81	\$27.67	\$25.14	\$33.52
Lineworker-in-charge	\$69.17	\$62.86	\$83.81	\$27.67	\$25.14	\$33.52
Cable Splicer	\$66.06	\$60.04	\$80.05	\$26.42	\$24.02	\$32.02
Electronic Technician	\$66.06	\$60.04	\$80.05	\$26.42	\$24.02	\$32.02
Lead Meter Technician	\$66.06	\$60.04	\$80.05	\$26.42	\$24.02	\$32.02
Lineworker	\$66.06	\$60.04	\$80.05	\$26.42	\$24.02	\$32.02
Relay & Meter Technician	\$66.06	\$60.04	\$80.05	\$26.42	\$24.02	\$32.02

In addition:

Miscellaneous expenses such
 as: PerDiem/Meals, Contractor
 Invoices and Personal Mileage

Material Cost of Material + 10% Handling

A&G 4.5% of total Labor, Vehicle, Misc Expense and Material

Margin 30% on all above

Schedule 17
Insurance Requirements

Workers' Compensation	Statutory
Employers' Liability	\$1,000,000
Auto Liability (owned, hired and non-owned)	\$1,000,000
Commercial General Liability (including Contractual Liability)	
Each Occurrence	\$2,000,000
Aggregate	\$4,000,000
Property Insurance	To Replacement Value
Umbrella or Excess Liability (if applicable)	\$10,000,000
Professional Liability (if applicable)	\$ 1,000,000
Environmental Liability (if applicable)	\$ 1,000,000

Schedule 26
Notices

On behalf of Customer:

City of Duluth
Joe Miller
1532 West Michigan Street
Duluth, MN 55802

On behalf of Company:

Minnesota Power
Customer Service Department
3215 Arrowhead Road
Duluth, Minnesota 55811

With a copy to:

ALLETE, Inc.
Attn: Legal Services Department
30 West Superior Street
Duluth, Minnesota 55802